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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

Nos. 79-824, 79-825, 79-826, 79-827

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

WNCN LISTENERS GUILD, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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JOINT BRIEF FOR PETITIONERS AMERICAN BROADCASTING COMPANIES, INC., CBS INC., METROMEDIA, INC., NATIONAL ASSOCIATION OF BROADCASTERS, NATIONAL BROADCASTING COMPANY, INC., NATIONAL RADIO BROADCASTERS ASSOCIATION, WBNS TV INC. AND RADIOHIO INCORPORATED

OPINIONS BELOW

The opinion of the court of appeals is officially reported at 610 F.2d 838 and appears as Appendix A of the petition for writ of certiorari of the Federal Communications Commission and the United States. The opinions of the Federal Communications Commission are reported at 60 F.C.C.2d 858 (1976) and 66 F.C.C.2d 78

(1977) and appear as Appendices D and E, respectively, of the Government's petition.*

JURISDICTION

The judgment of the court of appeals was entered on June 29, 1979. FCC App. 57a. On September 21, 1979, the time for filing petitions for a writ of certiorari was extended to November 26, 1979. The petitions for writs of certiorari were filed on that date, and were granted by this Court by orders entered on March 3, 1980. Jt. App. 95-98. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

This case involves the First Amendment to the Constitution of the United States, and Sections 3(h), 303(g), 307(d), 309(a), 309(e), 310(d), and 326 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 153(h), 303(g), 307(d), 309(a), 309(e), 310(d), and 326. These constitutional and statutory provisions are set forth in an Appendix to this brief.

QUESTIONS PRESENTED

Following a comprehensive policy and fact-finding inquiry, the Federal Communications Commission concluded that public interest goals of the Communications Act of 1934 and of the First Amendment would be best served by adhering to a long-standing regulatory approach that relies upon broadcaster judgments and marketplace competition to assure responsiveness to listeners' needs. The court of appeals disagreed and required the Commission to regulate changes in radio formats. The questions presented are:

* References to the Appendix to the Government's petition for writ of certiorari will be cited herein as "FCC App. ——." References to the Joint Appendix in these consolidated cases will be cited herein as "Jt. App. ——."

1. Whether the Communications Act of 1934 requires the FCC to regulate program format changes when the FCC specifically determined that such regulation would be contrary to the public interest.
2. Whether the First Amendment to the Constitution and Section 326 of the Communications Act bar government dictation of radio formats.

STATEMENT OF THE CASE

This case presents important questions concerning the authority of the government to regulate program formats of radio broadcast stations, and the proper role of the court of appeals in reviewing an agency determination not to engage in such regulation.

The term "program format" refers to the overall pattern of material broadcast by a radio station. Formats vary and, more importantly, are perceived by the listening audience to vary, not only by broad musical categories such as "rock" or "classical," but by many subcategories within musical types, as well as by pace, timing, and on-air personalities. These variations make any categorization of an individual format a generalized, imprecise and somewhat arbitrary description of the station's actual programming. No format is limited to music or other entertainment programming; all include news, information, and "talk." Some formats consist only of the latter type of material. The choice of program format, therefore, involves not only entertainment, but also news and other journalistic expression.

In this case, the court of appeals reversed a policy determination of the Federal Communications Commission ("FCC" or "Commission")—a policy consistent with more than forty years of agency practice—that government should not intrude on the discretion of broadcast licensees to initiate and change program formats.

The Role of Specialized Formats

Over the last fifty years, the number of radio stations has dramatically increased. In 1934, there were only 583 operating radio stations—all AM [1]—fewer than the number of television stations now on the air. Today, there are 8,761 operating AM and FM radio stations,[2] and most metropolitan areas are served by a vast array of stations.[3]

The development of television and the increase in the number of radio stations led most radio broadcasters to move away from general-interest formats towards specialized audio services. The result of this development has been a fragmentation of the listening audience.[4] The success of specialized radio in satisfying public desires is shown by the fact that the audiences of general-interest stations have declined while the overall radio audience, increasingly divided among a variety of specialized stations, has dramatically increased.[5]

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[1] *Inquiry and Proposed Rulemaking: Deregulation of Radio*, 44 Fed. Reg. 57,636, 57,646 (1979).

[2] FCC Public Notice, Broadcast Station Totals for March 1980 (April 9, 1980).

[3] 137 markets are served by ten or more radio stations. *Deregulation of Radio*, 44 Fed. Reg. at 57,646.

[4] For example, in 1967, three stations, of which two had general service formats, accounted for 79% of the audience share in Tulsa. By 1975, six stations, five of which featured specialized formats, had the same aggregate share. These formats—difficult to define with precision—included "country," "AM hit music," "country rock," and "standard songs." "A Report on Radio Station Format Changes" prepared by Robert E. Henabery to accompany comments of American Broadcasting Companies, Inc. submitted to the Federal Communications Commission in Docket No. 20682 [hereinafter "Henabery Report"], Jt. App. 39, 52, 69, 71, 72.

[5] Henabery Report, Jt. App. 44-45.

No one format is consistently attractive to listeners. In many markets, one or another "pop" or "rock" station is popular. In others, the leading station may feature "beautiful music" or "all-news." [6] The process of program format selection is a dynamic one. Radio stations constantly modify formats or try other formats. As tastes and interests change, as competitors adopt new programming approaches, as formats succeed and fail, stations alter their formats, sometimes subtly by stylistic and minor program changes, sometimes radically.[7] For instance, a "soft rock" music station might become wholly "disco" as that music becomes popular,[8] or a "beautiful music" station might change to "all-news" in an effort to attract a larger audience. On the other hand, a "soft rock" or "beautiful music" station might simply alter its mix of "talk" and music. The general terminology used to describe radio formats may thus reveal little about a station's actual programming mix.

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[6] In five of the nation's 25 largest radio markets, the leading station features some form of "news" or "talk." In nine of these markets, the most listened to station has some type of a "pop/adult" format, and "beautiful music" stations lead in five more markets. *Radio & Records Ratings Report*, 1979, Vol. 2 (based on ARBITRON data for October/November 1979).

[7] "[O]nce the decision has been made to program contemporary music, ethnic music, all-news, all-talk, or adult music, the format may, and likely will, be subjected to a dozen subtle or obvious shifts and adjustments." E. ROUTT, J. MCGRATH & F. WEISS, THE RADIO FORMAT CONUNDRUM 1 (1978).

[8] As a result of making this change, WKTU(FM) in New York City moved from a 1.4 market share in July-August 1978 to an 11.3 share in October-November 1978, becoming the leading station in the market. *Broadcasting*, January 22, 1979, at p. 32.

Moreover, the radio audience often perceives significant differences between apparently similar formats so that seemingly minor variations can have a substantial impact on attractiveness to listeners.[9] This also makes it difficult to distinguish among station formats. The process of choosing the content, pace, personality, and style of a station is at the core of radio decisionmaking. This is the very process which the court of appeals here has demanded that the FCC regulate.

The Development of Format Regulation

Prior to 1969, the Commission refrained from interfering in licensee choice of program formats.[10] The first format case to reach the court of appeals was *Citizens Committee to Preserve the Voice of the Arts in Atlanta* v. *FCC*, 436 F.2d 263 (D.C. Cir. 1970) [hereinafter *Atlanta*]. In *Atlanta*, the proposed transferee of two Atlanta stations desired to change their formats from classical music to a blend of "popular favorites, Broadway hits, musical standards, and light classics." The Commission held that since the transferee had shown that its proposed format would serve the public interest, "the matter is one for judgment of the broadcaster and the Commission . . . cannot properly insist that the prior format must be retained." [11]

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[9] "Radio Station Format Changes, Diversity, and Consumer Welfare," submitted as Appendix 1 to the Comments of National Association of Broadcasters, Jt. App. 23, 31-32 [hereinafter "Owen Study"].

[10] *See, e.g., En Banc Programming Report*, 44 F.C.C. 2303, 2308-09 (1960); *Bay Radio, Inc.*, 22 F.C.C. 1350, 1364 (1957).

[11] *Glenkaren Associates, Inc.*, 14 P&F Radio Reg.2d 104, 105-06 (1968), *reconsideration denied*, 19 F.C.C.2d 13 (1969), *rev'd sub nom. Atlanta.*

The court of appeals reversed the Commission's decision, beginning the development of the court's format doctrine. Because there was public opposition to the format change, the court held that the Commission should have conducted a hearing to determine whether the transfer would serve the public interest. In such a hearing the Commission should consider whether the existing classical music format was "unique" in the service area, whether it was financially viable, and whether it was the preference of a significant portion of the listening audience. Relying on the general "public interest" standard of Section 310(b) (now § 310(d), 47 U.S.C. § 310(d)) of the Communications Act, the court ruled that where numerous channels are available in an area, the public interest standard requires the Commission to ensure that "all major aspects of contemporary culture . . . be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." 436 F.2d at 269. In response to an argument that format regulation would make the FCC a "national arbiter of taste," the court stated:

> "[t]he Commission is not dictating tastes when it seeks to discover what they presently are, and then to consider what assignment of channels is feasible and fair in terms of their gratification." [12]

The Commission attempted to implement the court's *Atlanta* decision, but its efforts to minimize interference with licensee discretion were rebuffed by the court of appeals. In *Citizens Committee to Keep Progressive Rock* v. *FCC*, 478 F.2d 926 (D.C. Cir. 1973) [hereinafter *Progressive Rock*], the buyer proposed to change a "golden oldies" format to "middle of the road." There was no objection to the proposed change. While the assignment application was pending, the seller experimented

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[12] 436 F.2d at 272 n.7.

with a "progressive rock" format, which proved successful. Only after the assignment was approved did a citizens group protest the change to "middle of the road" from "progressive rock," filing a petition for reconsideration which the Commission denied. The FCC found that requiring the buyer to retain a format which had only been on the air five months, and which had been initiated after the purchase of the station was negotiated, would unacceptably abridge licensee programming discretion.[13]

On review, the court criticized the Commission's narrow reading of the *Atlanta* decision.[14] Basing its decision solely on its disagreement with the Commission as to the nature of the "public interest," the court concluded that, since a "significant" portion of the audience had complained, a hearing was required to resolve disputes over the uniqueness and financial viability[15] of the progressive rock format. 478 F.2d at 933.[16]

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[13] *Twin States Broadcasting, Inc.*, 35 F.C.C.2d 969 (1972), *rev'd sub nom. Progressive Rock.*

[14] 478 F.2d at 930.

[15] The court stressed that whether the licensee had suffered losses under the previous format was not the question that the Commission must address. Rather, it was required to determine whether that format *could be* economically viable. Only if it could be shown that under no circumstances could the station make a profit using the format would the Commission be permitted to approve the format change without a hearing. 478 F.2d at 931-32.

[16] In *Lakewood Broadcasting Service, Inc.* v. *FCC*, 478 F.2d 919 (D.C. Cir. 1973), finding that the Commission had rendered a "painstakingly thorough decision," 478 F.2d at 922, the court did affirm Commission approval of an assignment which resulted in a change from an "all-news" format to "country and western." In a cursory analysis, the court concluded that the Commission's findings that the "all-news" format was not financially viable and that many alternate news sources were available were supported by the record. 478 F.2d at 924-25.

[17] *Zenith Radio Corp.*, 38 F.C.C.2d 838 (1972), *reconsideration denied*, 40 F.C.C.2d 223 (1973), *vacated sub nom. WEFM.*

[18] Statement of Chairman Burch, *et al.*, 40 F.C.C.2d at 230-32.

In neither *Atlanta* nor *Progressive Rock* did the court of appeals cite any legislative history or past FCC or judicial decisions to support its interpretation of the public interest standard. Nor, apparently, did it consider the serious First Amendment implications of regulation in this sensitive area.

The WEFM Decision

The format controversy took on new significance in *Citizens Committee to Save WEFM* v. *FCC*, 506 F.2d 246 (D.C. Cir. 1974) (*en banc*) [hereinafter *WEFM*], a case involving the assignment of a Chicago radio station. The assignee of WEFM had proposed a "contemporary" format in place of the classical music the station had featured. The Commission approved the assignment on the grounds that two other stations in the area provided similar classical music service and that substantial operating losses had been incurred under the existing format.[17] Six Commissioners expressed doubts concerning government interference with licensee choice of radio formats. They suggested that the discretion the Commission had traditionally afforded broadcasters provided an essential flexibility—allowing development of new formats and the discarding of formats which had lost popular appeal.[18]

In vacating the FCC's decision, the court of appeals found that the Commission could not rely on the programming of the two other stations as substitutes for the

format being changed. In one case, the station did not serve exactly the same geographic area as WEFM. In the other case, the station had a "fine arts" format which the court thought was not necessarily a substitute for the classical music format being abandoned, despite the Commission's finding that the "fine arts" station was broadcasting classical music.[19] In addition, the court demanded that a hearing be held to determine whether the licensee's losses were attributable to the classical music format or to management practices.

For the first time, the court discussed in general terms its rationale for requiring government intervention in the format selection process, instead of relying upon licensee discretion and marketplace forces. It stated:

> "[w]e think it axiomatic that preservation of a format [that] would otherwise disappear, although economically and technologically viable and preferred by a significant number of listeners, is generally in the public interest." [20]

The court also held that "there is no longer any room for doubt that, if the FCC is to pursue the public interest, it may not be able at the same time to pursue a policy of free competition." [21] Without citing any evidence, the court asserted that advertisers distorted the radio market by favoring stations catering to young adults and therefore concluded that "broadcasters, left

[19] The court went so far as to posit a regulatory distinction between a classical music station concentrating on older music and one playing more twentieth century classical music. 506 F.2d at 264-65 n.28.

[20] 506 F.2d at 268 (footnote omitted). In addition, the court cited Section 303(g) of the Communications Act, which directs the Commission to "generally encourage the larger and more effective use of radio." 506 F.2d at 267.

[21] 506 F.2d at 267.

entirely to themselves by the FCC, would shape their programming to the taste of that segment of the public [young adults]." [22] It ruled that the marketplace could not be relied on to allocate formats.

Thus, the court directed that when an assignment or transfer application proposes a format change which would result in the loss of a unique format which "serves a specialized audience that would feel its loss," [23] a hearing must be held to determine whether the public interest would be served by the assignment unless the existing format was not financially viable. The court did not specifically address what steps the FCC should take at the conclusion of the hearing. However, the clear implication of the court's decision was that the agency would have to ensure that an existing format not be altered if it was found to be unique, financially viable and preferred by a significant segment of the audience in the station's service area.

Once again, there was no indication that the court gave any consideration to the legislative history of the Act or to constitutional issues presented by such regulation. Judge Bazelon concurred in the result despite significant doubts concerning the constitutionality of such program regulation. 506 F.2d at 268-84. Judges Robb and MacKinnon dissented. 506 F.2d at 284-85, 285-86.

The Commission's Inquiry Into Format Policy

The *WEFM* decision deepened the Commission's concern as to its proper role in format selection. That decision and other decisions of the court of appeals had not provided the FCC with an opportunity for general analysis of the implications and extent of FCC involvement in format changes, and interested parties, apart from the litigants in those cases, had also lack oppor-

[22] 506 F.2d at 268.

[23] *Id.* at 262.

tunity to comment on these issues. The Commission was troubled that the course on which the court had embarked might entail serious adverse public interest consequences without countervailing benefits. Moreover, it was disturbed that the court had mandated broad and unprecedented program review without any consideration of the First Amendment implications of its decisions. The Commission therefore initiated an inquiry seeking both comments on what its policy should be and proposals for administering any regulatory approach it might adopt. *Notice of Inquiry: Changes in the Entertainment Formats of Broadcast Stations*, 57 F.C.C.2d 580 (1976), FCC App. 60a [hereinafter *Notice of Inquiry*].[24]

More than 50 parties submitted comments supporting and opposing format regulation; these comments included several studies of the broadcast market. One study, the Henabery Report,[25] examined the development of specialized formats and demonstrated that a wide variety of formats was already available, particularly in major markets. Focusing on two particular markets as examples, the report further noted that, although the differences between two stations' formats were often subtle, they could result in wide variations in attractiveness to listeners, and that a station's format rarely remained static, but changed substantially over time in response to changes in audience tastes. The report concluded that

[24] Among the questions on which the Commission sought comment were whether the Commission should categorize formats, what burdens should be placed on persons objecting to format changes, what bases should be used to determine which of two unique formats would be preferable, and in what types of proceedings format questions should be considered. 57 F.C.C.2d at 584-85, FCC App. 70a-71a.

[25] *See* note 4, *supra*. Mr. Henabery is a consultant specializing in the development of new radio formats and has substantial experience in broadcasting. Jt. App. 42-43.

a government agency could not adequately define or distinguish formats, and that regulation would stifle innovation.

The Commission also received an analysis by economist Bruce Owen, who criticized the economic assumptions of the court in *WEFM*. Owen Study, Jt. App. 23.[26] Owen demonstrated that the court's assumption that an increase in the number of "unique" formats would maximize consumer satisfaction had no basis. The court's approach did not take into account varying degrees of preference for a given format; assigned no value at all to diversity which may exist within a single format type; and failed to take account of the desire of many listeners to have a choice among several stations with seemingly identical programming. Government intervention to preserve "unique" formats, Owen urged, would disserve the public interest both by preventing format changes which might increase the level of overall public gratification and by deterring program innovation. Owen concluded that the existing system, although not a perfect reflection of consumer desires, achieved better results than could any feasible system of regulation.[27].

[26] Dr. Owen, then Assistant Professor of Economics at Stanford University, Jt. App. 25, is now Director, Economic Policy Office, Antitrust Division, Department of Justice. He has written several books and articles on broadcast economics and on communications policy generally.

[27] NAB also submitted a study showing the diverse number of formats available in major markets, Appendix 2 to the Comments of National Association of Broadcasters, and data showing that advertisers, contrary to the *WEFM* court's assumption, did not consistently favor stations appealing to one demographic group—young adults. Appendix 4 to the Comments of National Association of Broadcasters. To demonstrate the impossibility of effectively classifying for-

The Commission's Policy Statement

After considering the comments, the Commission issued a policy statement [28] in which it concluded that regulation of program formats as required by the court of appeals would not serve the public interest. Any scheme of format regulation, the Commission determined, would result in widespread government entanglement in the editorial decisions of licensees, an area in which Congress had intended to leave decisions to broadcaster judgments.[29] It concluded that licensees should be free to determine what programming would best satisfy the listening public.

The Commission also found that since the Act contemplates competition among broadcasters, as this Court has recognized,[30] "[licensees] must necessarily [compete] in the domain of program formats, because there is virtually no other form that competition among broadcasters can take." 60 F.C.C.2d at 860, FCC App. 123a. Recognizing that licensee format choice would likely not achieve perfect diversity, the Commission nonetheless found that the benefits of relying on broadcaster judgments outweighed any marginal increase in diversity that regulation might provide. Relying on the Owen Study, a study conducted by the FCC's staff on marketplace format

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mats, Metromedia submitted a listing which showed 58 different variations on "middle of the road" formats. Attachment = 2 to the Comments of Metromedia, Inc.

[28] *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858 (1976), FCC App. 117a [hereinafter *Policy Statement*].

[29] *Id.* at 865, FCC App. 133a-34a.

[30] *FCC* v. *Sanders Brothers Radio Station*, 309 U.S. 470, 474-75 (1940) [hereinafter *Sanders Brothers*].

diversity, and other material in the record, the Commission concluded that regulation of formats would not necessarily lead to greater listener satisfaction. There would be no way for the Commission to weigh intensity of listener demand in the abstract, so FCC regulation would have little prospect of attaining greater levels of overall satisfaction.[31] The Commission stated that:

> "the marketplace is the best way to allocate entertainment formats in radio, whether the hoped for result is expressed in First Amendment terms (*i.e.*, promoting the greatest diversity of listening choices for the public) or in economic terms (*i.e.*, maximizing the welfare of consumers of radio programs)." [32]

Regulation of format changes would also chill innovation, which the Commission found was aided by marketplace forces.[33] The Commission concluded that such regulation would also impermissibly involve the Commission in continuing surveillance of broadcasters' programming,[34] and that this regulation would have to be undertaken without adequate standards. In view of the difficulty of defining or distinguishing among formats, there was no practical way to determine whether one or another format is "unique," or whether by subtle changes in programming a broadcaster has altered an earlier format. Coupled with the difficulties of evaluating claims of financial burden under the standards set by the court, the Commission saw few ways to avoid a hearing when a format change was challenged.[35]

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[31] *Id.* at 863-64, FCC App. 129a-30a.

[32] *Id.* at 863, FCC App. 128a.

[33] *Id.* at 864, FCC App. 131a.

[34] *Id.* at 864-65, FCC App. 131a-34a.

[35] *Id.* at 862-63, FCC App. 127a-28a. The Commission pointed to the lengthy and complex hearings conducted after

On reconsideration, the Commission reaffirmed its decision,[36] stressing that diversity of formats in and of itself could not be equated with the public interest, since the use of that standard would not take into account either intensity of demand or desire for variations within formats.[37] Absent any reason to believe that regulation would function better than the marketplace, and with the strong possibility that it might be worse, the Commission saw no reason to engage in a scheme of intrusive surveillance.[38] In summary, the Commission found that, although free choice of formats would not result in perfect diversity, government regulation of format changes would be inconsistent with the Communications Act, would not advance the public welfare, would create serious administrative difficulties, and would pose grave constitutional problems.

The Court of Appeals Decision

Several parties petitioned for review of the *Policy Statement* pursuant to Section 2342 of the Judicial Code, 28 U.S.C. § 2342. The *en banc* court held the Commission's policy statement to be "unavailing and of no force and effect." 610 F.2d at 858, FCC App. 40a.

The court for the first time made clear that the rationale of *WEFM* could not be limited to assignment and transfer cases, but extended as well to renewal applications when the loss of a unique format is involved. 610 F.2d at 849, FCC App. 20a. The court denied that its format decisions constituted judicial formulation of communications policy and insisted instead that the format cases rested on an interpretation of the "public interest" standard of the Communications Act—an interpretation not subject to reexamination by the Commission. The court held that when a change from a format is involved, a hearing must be held unless there is conclusive evidence that there is insignificant public grumbling, that the existing format is the preference of a group too small to be accommodated by available radio stations, that there is an adequate substitute for the existing format in the service area or that the existing format is not economically viable.[39]

While recognizing that the agency was "better equipped to develop legislative-type facts," [40] the court substituted its own factual analysis for the Commission's. Disregarding the conclusions of both the Owen and Henabery reports and the Commission's staff study which confirmed those conclusions, the court continued to find on the basis of "common sense," [41] without any factual support, that duplication of formats is wasteful and —if achieved through the loss of a "unique" format— contrary to the public interest.

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the *WEFM* remand as indicative of the problems format regulation would entail. *Id.* at 864, FCC App. 131-32a.

[36] *Changes in the Entertainment Formats of Broadcast Stations*, 66 F.C.C.2d 78 (1977), FCC App. 176a [hereinafter *Reconsideration Order*].

[37] *Id.* at 81, FCC App. 182a-83a.

[38] The Commission contrasted the close control of overall program content involved in format regulation with its limited review of news and public affairs programming, where "the licensee is left with virtually unrestricted discretion in programming most of the broadcast day." *Id.* at 83, FCC App. 187a-88a.

[39] 610 F.2d at 843, FCC App. 8a.

[40] *Id.* at 855, FCC App. 34a.

[41] *Id.* at 857, FCC App. 37a.

In rejecting the Commission's economic analysis, the court repeatedly faulted the Commission for not releasing its staff study of marketplace format diversity prior to its decision so that the public could have commented on it. Nevertheless, the court specifically declined to reject the *Policy Statement* on this procedural point,[42] and stated that it would not be persuaded of the Commission's position "even if we were to accept the study on its own terms." [43]

The court below gave scant attention to the serious constitutional and statutory issues raised by format regulation.[44] As with its previous format decisions, the court did not discuss the legislative history of the Communications Act, and it cited no previous Commission or court decisions which supported format regulation.[45] Despite

[42] 610 F.2d at 847 n.24, FCC App. 17a.

[43] *Id.* at 856, FCC App. 35a. Prepared largely from published trade materials, the FCC study examined radio formats in the largest metropolitan markets and concluded that great diversity already existed, with diversity within formats being almost as significant a factor in public acceptance as diversity among them. Appendix B to the *Policy Statement*, 60 F.C.C.2d at 872-81, FCC App. 156a-70a. No party has argued that the study contains factual errors.

[44] The court dismissed the constitutional questions by noting that in *WEFM* it had "found no constitutional impediment to the decision as we understood it." 610 F.2d at 855, FCC App. 33a. Constitutional issues were neither briefed nor argued in *WEFM*, and the only detailed discussion of these issues in the whole history of these cases was in Judge Bazelon's concurring opinion in *WEFM*, in which he expressed doubt as to the constitutionality of the result reached by the court in that case. 506 F.2d at 268-84.

[45] In contrast to previous adjudicatory cases, however, these issues, as well as constitutional arguments, had been fully briefed and argued.

the court's requirement that the FCC engage in extensive regulation the court somehow concluded that there was

> "no authority under *WEFM* to interfere with licensee program choices . . . [or] restrain the broadcasting of any program, dictate adoption of a new format, force retention of an existing format or command provision of access to non-licensees." [46]

The court also denied that its format doctrine required pervasive government entanglement in licensee decision-making, and accused the Commission of misreading and exaggerating the court's decisions. The Commission's concern over administrative problems was discounted because only one case, *WEFM*, had ever gone to hearing, with all others being settled. The court also stated that questions of uniqueness and financial viability could generally be determined without the need for a hearing, although the court's prior decisions had required hearings on just such issues.[47]

Judge Bazelon concurred in the result, based entirely on a procedural point. However, he criticized the majority's lack of deference to the Commission's policy judgment. In his view,

> "the majority virtually confines the FCC to a spectator's role in formulating policies that will promote and preserve diversity while minimizing the hazards of government intrusion into the content of broadcasting." [48]

He also observed that the majority had failed "to grapple seriously with the constitutional implications of its decision." 610 F.2d at 859, FCC App. 42a. Judge Leventhal also concurred separately.

[46] 610 F.2d at 851, FCC App. 25a-26a.

[47] *Id.*, FCC App. 24a-25a.

[48] 610 F.2d at 858-59, FCC App. 41a-42a.

Judge Tamm, joined in dissent by Judge MacKinnon, charged that the majority "usurps the proper role of the Federal Communications Commission . . . in the formulation of communications policy." 610 F.2d at 860, FCC App. 46a. The dissent stated:

> "In the present case, the majority disregards the Commission's expert knowledge and, in so doing, violates the mandate of *FCC* v. *National Citizens Committee for Broadcasting* [436 U.S. 775 (1978)].
>
> The majority has lost sight of our role as a reviewing court whose proper function is to uphold an agency's reasonable judgment . . . . Faced with a conflict between judicial and administrative policies, I believe we are obliged to uphold the Commission." [49]

The dissenters urged that the majority had no basis for rejecting the Commission's conclusions as to the practical impossibility of distinguishing among formats and of comparing the intensity of preferences for different formats. Similarly, they concluded that the majority had no basis for rejecting the agency's conclusion that more listeners might be satisfied by choices offered by the marketplace than by regulation.[50] Indeed, the dissent noted that the court of appeals' requirements "favor[ed] the interest of fewer listeners over the interests of more listeners," and observed that "the majority has failed to identify the principle within the Communications Act that mandates [such] regulation." [51]

Following the decision of the court of appeals, the Commission and the United States, as well as these petitioners and other private parties, petitioned this Court for writs of certiorari. The petitions were granted and the several cases consolidated on March 3, 1980.

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[49] *Id.* at 865, FCC App. 56a (footnote deleted).

[50] *Id.* at 862-64, FCC App. 49a-53a.

[51] *Id.*, FCC App. 53a-54a.

SUMMARY OF ARGUMENT

The decision of the court of appeals requires the Federal Communications Commission to abandon a forty-year tradition by instituting a regulatory regime designed to scrutinize changes in "unique" radio program formats when a broadcaster seeks to renew or assign a station license. In dictating regulation in this area, the court arrogated to itself the establishment of communications policy and ignored important statutory and constitutional restraints on government intrusion into broadcast programming.

I.

In setting aside the Commission's policy, the court of appeals identified no provision of the Communications Act specifically mandating format regulation, pointed to nothing in the legislative history of the Act suggesting that such regulation was required and cited no administrative or judicial precedent—other than its own previous format opinions—as authority. Instead, the decision below relied on the broad "public interest" standard of the Communications Act of 1934. Both the legislative history of the Act and numerous decisions of this Court make clear that the definition of the public interest is primarily a matter for the regulatory agency and not for the reviewing court. As this Court held in *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978), Congress delegated to the Commission the "weighing of policies under the 'public interest' standard."

The court of appeals primarily rested its decision on the ground that it "is surely in the public interest . . . for all major aspects of contemporary culture to be accommodated by the commonly-owned public resources whenever that is technically and economically feasible." In fact, the Communications Act imposes no such re-

quirement. *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. at 810.

The Commission has consistently determined that under the Communications Act the selection of formats is a matter best left to the editorial judgment of broadcasters, and the agency's interpretation of its governing statute is, of course, entitled to great deference. *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94, 121 (1973) [hereinafter *CBS* v. *DNC*]. In overturning that interpretation here, the court of appeals exceeded its authority.

Any interpretation of the Act which would require the Commission to regulate the selection of radio program formats is directly contrary to decisions of this Court which make clear that the Communications Act embodies a policy of leaving the selection of programming to broadcasters and is designed "to preserve editorial control of programming in the licensee." *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 705 (1979) [hereinafter *Midwest Video*]. *See also CBS* v. *DNC*, 412 U.S. at 105. In this connection, Congress, during the consideration of the Radio Act of 1927 and the Communications Act of 1934, focused generally on the question whether the agency should be authorized to set program priorities in assigning radio licenses, and specifically on the question whether the agency should be empowered to regulate the types of music to be broadcast (for example, "high class music" as opposed to "jazz"). A proposal to permit the agency to establish programming priorities was eliminated from the bill because of fears of censorship, and these concerns led directly to Section 326 of the Communications Act, 47 U.S.C. § 326, which explicitly prohibits agency censorship. Thus, the only legislative history bearing on the Commission's authority to regulate program formats demonstrates that Congress desired to leave the choice of program formats to broadcasters.

II.

The " 'public interest' standard necessarily invites reference to First Amendment principles." *CBS* v. *DNC*, 412 U.S. at 122. Such principles strongly support the Commission's determination not to engage in format regulation.

The regulatory regime established by the court of appeals would thrust the Commission into a programming role it has never before assumed and which the decisions of this Court have never before permitted. For example, the fairness doctrine has been sustained only because it "contemplates a wide range of licensee discretion" and does not dictate or control broadcasters' initial choices of programming. *Midwest Video*, 440 U.S. at 705 n.14. Here, in contrast, the decision requires the Commission, in certain circumstances, to dictate a licensee's entire program schedule by restraining the broadcast of a proposed format and by forcing the licensee to retain an existing format when the broadcaster has affirmatively exercised a contrary editorial judgment. In requiring a broadcaster to present a certain type of programming in place of another, the Commission would be imposing a prior restraint on speech and would be violating the fundamental principle that government regulatory action must be neutral and may not favor one side of an issue or one public taste over another. *See FCC* v. *Pacifica Foundation*, 438 U.S. 726, 745-46 (1978) (Stevens, J.).

In imposing regulatory requirements rejected by the FCC, the decision below conflicts with *CBS* v. *DNC* where this Court held that the court of appeals could not require the Commission to impose specific programming requirements or override broadcasters' day-to-day editorial judgments. While *CBS* v. *DNC* involved only spot advertising, here the entire broadcast program schedule is at issue. The court of appeals would deprive

broadcasters of their discretion to select that schedule and would thrust the Commission into detailed regulation of broadcast program content.

The Commission's factual findings confirm that such regulation would contravene the policies of the First Amendment, and these findings are entitled to "great weight." *CBS* v. *DNC*, 412 U.S. at 102. The Commission found that format regulation would be "unconstitutional as impermissibly chilling innovation and experimentation in radio programming" because broadcasters would be deterred from adopting innovative formats. *Changes in the Entertainment Formats of Broadcast Stations*, 60 F.C.C.2d 858, 865-66 (1976), FCC App. 117a, 134a.

The Commission also found that it was not possible to devise adequate standards to regulate radio formats because the boundaries between format types are extremely elusive, because there is no method for objectively gauging public dissatisfaction with the format change, and because it is impossible to compare the relative "public interest" in the existing and proposed formats. The agency would therefore be compelled to make a wide variety of unguided and subjective judgments that would necessarily lead to the imposition of its own program preferences on broadcasters.

ARGUMENT

INTRODUCTION

This case involves the necessity and appropriateness of Commission regulation of radio program formats. The fundamental question is whether the Commission is required to regulate changes in radio formats or whether it may leave such decisions to the judgment of individual broadcast licensees.

The decision below requiring that the Commission engage in such regulation was the culmination of a sharp policy divergence between the Federal Communications Commission and the court of appeals. In a series of decisions commencing in 1970, and ending with the decision under review, the court directed the Commission to engage in active supervision of program format changes despite the Commission's consistent policy against such interference. As in the decisions reversed in *Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 412 U.S. 94 (1973) [hereinafter *CBS* v. *DNC*] and *FCC* v. *National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) [hereinafter *FCC* v. *NCCB*], the court of appeals relied on the broad "public interest" standard in mandating specific regulation to reflect its own perception of the public interest.

Unquestionably, the decisions of the court of appeals requiring format regulation represent a radical departure from traditional standards. As the Commission observed, "[f]or over 40 years . . . broadcast applicants have been free to select their own programming formats."[52] Consistent with that uninterrupted history and based on its long experience in administering the governing statute, the Commission concluded that regulation of radio

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[52] *Notice of Inquiry*, 57 F.C.C.2d at 585, FCC App. 72a.

formats would be contrary to the policies embodied in both the Communications Act and the First Amendment. There is nothing in the Act which suggests that the Commission's determination was impermissible. Indeed, the legislative history as well as past decisions of this Court and the Commission construing the Act and the First Amendment confirm the correctness of the Commission's judgment.

I. THE COMMUNICATIONS ACT DOES NOT REQUIRE THAT THE COMMISSION REGULATE RADIO PROGRAM FORMATS, AND THE REGULATORY REGIME IMPOSED BY THE COURT OF APPEALS CONSTITUTES IMPERMISSIBLE JUDICIAL FORMULATION OF COMMUNICATIONS POLICY

Under the Communications Act, each broadcaster must secure renewal of its broadcast license from the Commission every three years. When a broadcaster seeks to assign a license, advance Commission approval must also be obtained. 47 U.S.C. §§ 307(d), 310(d). In either event the standard is whether the "public interest, convenience and necessity"—the so-called public interest standard of the Communications Act—would be satisfied. 47 U.S.C. §§ 307(d), 309(a), 310(d). Under Section 309(e) of the Act, a hearing must be held if there are substantial and material questions of fact involved in the public interest determination. 47 U.S.C. § 309(e).

Over the course of time program formats are often changed. Such a change may occur at the time that a station is sold to a new entity, reflecting a desire on the part of the new owner to adopt its own approach to programming, or an existing owner may determine to alter its program format in the course of the station's on-going operation because of the unpopularity of the existing format, because the station is not doing well financially, because the tastes of the station's audience

have changed, or because competitors have altered their own programming. The change may also simply reflect the desire of a broadcaster to be innovative. The court of appeals' decision requires regulation of format changes proposed either in an assignment or renewal application, or occurring during a license term, if the station proposes to or has abandoned a "unique" format.[53]

If a broadcaster seeks to alter a unique format, the court of appeals' decision purported only to require a hearing, thus leaving open the possibility that the alteration might ultimately be approved. However, the court made clear that if sufficient public "grumbling" is present and the existing unique format is financially viable, there is no apparent basis for Commission authorization of a change except possibly where the proposed format is also unique.[54]

In essence, the court required the Commission to dictate a licensee's program schedule by forcing it to continue to play "classical" music or "progressive rock," or "country and western," or "underground," or "easy listening," or "big band"—where the broadcaster has in the exercise of its own programming judgment concluded that a different format or format mix would better serve its audience. Thus, contrary to the court of appeals' suggestion, the decision below does far more than require

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[53] When a change occurs during the license term, the issue would be considered if raised at renewal time. 610 F.2d at 849 n.29, FCC App. 20a.

[54] In an earlier case, *WEFM*, the court suggested that where the proposed format would be new to the service area, and would be preferred by a larger number of people than preferred the existing unique format, the Commission might have authority to authorize a change. 506 F.2d at 260. However, the court did not address this possibility in the decision below.

the Commission to "take a station's format into consideration in deciding whether to grant certain applications." [55] It "restrain[s] the broadcasting of [a new] program" and "force[s the] retention of an existing format." [56]

Moreover, the premise of the District of Columbia Circuit's format cases—that the Communications Act's "public interest, convenience, and necessity" standard requires interference with broadcasters' program format choices—suggests that still further expansion of program regulation might be required. While the court of appeals did not address the issue, there is a significant danger that the court's rationale could lead it to extend format requirements to proceedings authorizing new stations, thus requiring the Commission to begin evaluating the program formats proposed by these applicants. Indeed, the court of appeals' rationale might be urged to require the Commission to hold marketwide proceedings to consider whether one of two or more existing licensees operating with duplicative formats should be compelled to adopt a unique format to serve some portion of the listening audience which may not presently have available the format which it may prefer. Thus the format doctrine might be extended to require that the Commission engage in the regulation of all stations, and all program formats, so that the Commission would have a far more intrusive role in programming decisions than is purportedly contemplated by the court of appeals.[57]

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[55] 610 F.2d at 851, FCC App. 25a.

[56] *Id.*, FCC App. 25a-26a.

[57] The rationale of the decision might even be urged to extend to the regulation of individual programs if there were sufficient public grumbling. The Commission has rejected just such complaints in the past. For example, in *Community Media Corp.*, 61 F.C.C.2d 493 (1976), it rejected a petition to deny a license renewal which claimed that the radio station's cancellation of a certain program, *Flight 105*, was "inconsistent with the public interest, particularly in light of the numerous persons who signed petitions in favor of the continuation of the program." *Id.* at 494.

In contrast to *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969) [hereinafter *Red Lion*], and *FCC* v. *Pacifica Foundation*, 438 U.S. 726 (1978) [hereinafter *Pacifica*], where specific statutory provisions authorized limited Commission regulation,[58] no section of the Act requires or encourages the regulation of radio program formats. In imposing this requirement, the court of appeals cited no section of the Act other than the public interest standard. As we demonstrate below, Congress did not authorize reviewing courts to formulate communications policy by defining the requirements of the public interest.

A. The Scope of the Court of Appeals' Review of the Federal Communications Commission Is Strictly Limited and Does Not Permit the Court To Dictate Communications Policy

In the Radio Act of 1927, the Federal Radio Commission was authorized to grant and renew licenses under the public interest standard.[59] Review of these decisions was vested in the Court of Appeals of the District of Columbia. Section 16 of the Act provided that the court

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[58] In *Red Lion*, Section 315 of the Communications Act, 47 U.S.C. § 315, was cited as explicit authority for the Commission's fairness requirements. 395 U.S. at 380-86. In *Pacifica*, the Commission had relied on Section 1464 of the Criminal Code, 18 U.S.C. § 1464, which expressly forbade the use of "obscene, indecent, or profane language by means of radio communications." 438 U.S. at 731.

[59] Radio Act of 1927, ch. 169, §§ 9, 11, 44 Stat. 1162. While initially this plenary authority was to be temporary, in 1929 Congress extended it for an indefinite period. Act of December 18, 1929, ch. 7, 46 Stat. 50.

could "alter or revise the decision appealed from and enter such judgment as to it may seem just." [60] That Act was construed by the court of appeals as conferring *de novo* review authority and as authorizing the court to determine the "public interest" in particular regulation.[61] *FRC* v. *General Electric Co.*, 281 U.S. 464 (1930), confirmed that interpretation, finding that the court was in effect acting as "a superior and revising agency." [62] However, this Court held that it could not review such determinations by the court of appeals because its own appellate jurisdiction was limited to judicial functions, and it could not "exercise or participate in the exercise of functions which are essentially legislative or administrative." [63]

Congress reacted quickly to the Court's decision in *General Electric*. A bill was introduced to revise Section 16 to provide "[t]hat the review by the court shall be limited to questions of law and that findings of fact by the commission, if supported by substantial evidence, shall be conclusive unless it is shown clearly that the findings of the Commission are arbitrary or capricious." [64] In the course of the debate it was noted that "[u]nder its interpretation of the appeal provision in the existing

[60] Radio Act of 1927, § 16.

[61] *See Chicago Federation of Labor* v. *FRC*, 41 F.2d 422 (D.C. Cir. 1930); *Great Lakes Broadcasting Co.* v. *FRC*, 37 F.2d 993 (D.C. 1930); *General Electric Co.* v. *FRC*, 31 F.2d 630 (D.C. Cir. 1929), *cert. dismissed*, 281 U.S. 464 (1930).

[62] 281 U.S. at 467.

[63] 281 U.S. at 469. At that time the court of appeals exercised both judicial and legislative functions. *See* P. BATOR, R. MISHKIN, D. SHAPIRO & H. WECHSLER, HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 47 (2d ed. 1973).

[64] H.R. 12599, 71st Cong., 2d Sess. (1930).

law the *Court of Appeals of the District of Columbia assumed to perform the function of a superradio commission, substituting its judgment and discretion for that of the Federal Radio Commission.*" [65] In enacting the bill,[66] Congress made clear that the reviewing court was to have a far more limited function.

Section 16, as amended, was incorporated without change as Section 402(e) of the Communications Act of 1934 [67] and the review standards of the 1930 Act were essentially applied to all agencies by Section 10(e) of the Administrative Procedure Act.[68] In decisions construing

[65] 72 CONG. REC. 11530 (1930) (emphasis supplied).

[66] Act of July 1, 1930, ch. 788, 46 Stat. 844.

[67] Communications Act of 1934, ch. 652, § 402(e), 48 Stat. 1064 (1934) (current version at 47 U.S.C. § 402(g)).

[68] After the enactment of the Administrative Procedure Act, the Communications Act was amended so that the standards of judicial review under the Administrative Procedure Act would be applied to FCC decisions. Act of July 16, 1952, ch. 879, § 14, 66 Stat. 711. The Administrative Procedure Act limits the scope of judicial review of agency policy judgments to deciding whether the agency's "action, findings and conclusions" are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The legislative history of the Administrative Procedure Act confirmed that court review of agency action is

> "generally limited to the inquiry whether the administrative agency acted within the scope of its authority. The wisdom, reasonableness, or expediency of the action in the circumstances are . . . matters of administrative judgment to be determined exclusively by the agency."

Report of the Attorney General's Committee on Administrative Procedure, S. DOC. No. 8, 77th Cong., 1st Sess. 87 (1941).

these statutes, this Court has repeatedly confirmed that where the court of appeals reviews actions of the Federal Communications Commission under the public interest standard, the court should not exercise a policymaking role or function as "a superradio commission."

FRC v. *Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266 (1933), addressed the changes brought about by the 1930 amendment. There the Commission had granted permission to a licensee for the expansion of its broadcast service to a frequency already occupied by two other licensees, and ordered the other stations to cease operations. The court of appeals set aside the Commission orders, concluding that the evidence demonstrated that the public interest would not be served by terminating the licenses.[69]

This Court reversed, holding that the court of appeals had exceeded its power. It found that the standard of review established by the 1930 amendment:

> "is in sharp contrast with the previous grant of authority. No longer is the Court entitled to revise the Commission's decision and to enter such judgment as the Court may think just. The limitation manifestly demands judicial, as distinguished from administrative, review." [70]

Subsequent decisions of this Court have confirmed that the Commission has primary responsibility for defining the public interest. *FCC* v. *NCCB*, 436 U.S. at 810; *National Broadcasting Co.* v. *United States*, 318 U.S. 190, 224 (1943); *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137-38 (1940). In cases involving other agencies the Court has also held that where standards such as "public interest, convenience and necessity" are involved, "[t]he very breadth of the statutory language precludes a reversal of the [agency's] judgment save where it has plainly abused its discretion." [71] Moreover, where an agency acts under such general standards, its discretion is particularly broad when it determines not to regulate as contrasted with the situation in which it acts affirmatively to impose a regulatory regime.[72]

[69] *Nelson Bros. Bond & Mortgage Co.* v. *FRC*, 62 F.2d 854, 857 (D.C. Cir. 1932), *rev'd*, 289 U.S. 266 (1933).

[70] 289 U.S. at 276.

In the last decade this Court on two occasions found that the court of appeals had engaged in impermissible policymaking where that court had ordered regulation which the Commission had rejected under the public interest standard.

In *CBS* v. *DNC*, the Commission had concluded that public access requirements would not advance either the public interest or the goals of the First Amendment, and had declined to order broadcasters to sell time for editorial advertising.[73] The court of appeals set aside the Commission's decision, holding that the Communications Act and the First Amendment required that time be sold and ordering the Commission to establish an appropriate regulatory scheme.[74] This Court reversed. Finding that

[71] *SEC* v. *Chenery Corp.*, 332 U.S. 194, 208 (1947). *See also Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293-94 (1974).

[72] *See FCC* v. *NCCB; CBS* v. *DNC*. Where the agency determines not to act, its judgment may reflect not only its view that such regulation is undesirable, but also its conclusion that the agency's limited resources might better be devoted to other regulatory tasks.

[73] *Democratic National Committee*, 25 F.C.C.2d 216 (1970), *rev'd sub nom. Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS* v. *DNC; Business Executives' Move for Vietnam Peace*, 25 F.C.C.2d 242 (1970), *rev'd*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS* v. *DNC*.

[74] *Business Executives' Move for Vietnam Peace* v. *FCC*, 450 F.2d 642 (D.C. Cir. 1971), *rev'd sub nom. CBS* v. *DNC*.

"nothing in the language of the Communications Act or its legislative history compels a conclusion different from that reached by the Commission," [75] this Court determined that the court of appeals had improperly abrogated the agency's authority under the public interest standard. The court of appeals was admonished for "fail[ing] to give due weight" to the Commission's "judgment in these matters." [76]

FCC v. *NCCB* was similar. There the Commission, again acting under the public interest standard, had adopted a regulation barring new co-located newspaper-broadcast combinations, but had declined to order divestiture of existing combinations except in sixteen "egregious cases." [77] The District of Columbia Circuit held that the grandfathering of most combinations was "arbitrary and capricious" and ordered the Commission to promulgate regulations requiring divestiture.[78]

This Court reversed, holding that the Commission's decision should be sustained since it was based upon findings that "were primarily of a judgmental or predictive nature," [79] and because Congress delegated to the

[75] 412 U.S. at 122.

[76] *Id.* at 123.

[77] *Second Report and Order* (Docket No. 18110), 50 F.C.C.2d 1046 (1975), *as amended upon reconsideration*, 53 F.C.C.2d 589 (1975), *rev'd sub nom. National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC* v. *NCCB*.

[78] *National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC* v. *NCCB*.

[79] *FCC* v. *NCCB*, 412 U.S. at 813.

Commission authority for the "weighing of policies under the 'public interest' standard." [80]

B. The Court of Appeals in this Case Has Impermissibly Substituted its Policy Judgment for the Policy Judgment of the Commission

The court of appeals in this case has substantially departed from the appropriate standards of judicial review. Despite the court's purported recognition that it "has neither the expertise nor the constitutional authority to make 'policy' as that word is commonly understood," [81] there can be little doubt that it was in fact making policy and not, as it claimed, merely articulating "the *law* of the land." [82] As the separate opinions observed, "the majority virtually confines the FCC to a spectator's role" [83] and, in prescribing policy for the Commission, has "lost sight of [its] role as a reviewing court." [84] In doing so the court of appeals also ignored this Court's admonition in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 558 (1978), that "[a]dministrative decisions should be set aside . . . only for procedural or substantive reasons as mandated by statute . . . [and] not simply because the court is not happy with the result reached." [85]

[80] *Id.* at 810.

[81] 610 F.2d at 854, FCC App. 32a.

[82] *Id.*, FCC App. 32a (emphasis in original).

[83] *Id.* at 858-59, FCC App. 41a-42a (Bazelon, J., concurring).

[84] *Id.* at 865, FCC App. 56a (Tamm, J., dissenting).

[85] *See generally Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971); *Permian Basin Area Rate Cases*, 390 U.S. 747, 767 (1968); *NLRB* v. *Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 348 (1953).

To be sure, the Commission's authority to define the "public interest" is not unlimited, particularly where other policies of the Act are involved, such as those favoring freedom of broadcaster program choice. However, here the court of appeals did not identify a single recognized ground for setting aside the Commission's judgment.

As we discuss below,[86] there is no basis for contending that the Commission's format decision was inconsistent with prior agency policies or adjudications. Neither was the Commission's decision otherwise "arbitrary or capricious." The court of appeals did not make any such determination, nor did it remand the case to the agency as would have been appropriate if it had believed that the Commission's findings were unreasonable.[87]

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[86] *See* pp. 51-53 *infra*.

[87] While at one point the court questioned the "rationality" of the Commission's decision (610 F.2d at 846, FCC App. 14a), and at other places questioned certain of the Commission's factual findings (*e.g.*, *id.* at 847-49, 853, 856-57, FCC App. 17a-20a, 29a-30a, 37a), the decision below was based on the court's view that, no matter how rational the Commission's decision might have been, the public interest standard requires regulation of radio program formats as a matter of law.

The court of appeals, although criticizing the Commission for its reliance on a staff study depicting the degree of diversity in broadcasting because the study was not made available for comment, did not rely on this alleged error as a ground for reversing the Commission. *Id.* at 847 n.24, FCC App. 17a.

No one has advanced any substantive objections to the study or explained how such objections might properly have dissuaded the Commission from relying on the study. In one

The policy-making nature of the court of appeals' decision is readily apparent when its grounds for reversing the Commission are examined.

First, the court suggested that the Commission "displayed a deep-seated aversion to the decisions of this court" [88] and failed to view them "sympathetically." [89] Thus, the court stated that the Commission had exaggerated the adverse impact of the court of appeals' prior decisions and at the same time had failed "to take affirmative steps to minimize what it perceived as the intrusive features of the format decisions." [90] The court was also critical of the Commission for suggesting that the implementation of format regulation would lead to

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of the cases relied on by the court of appeals in criticizing the Commission, the court said:

> "[C]omments must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes of concern. The comment cannot merely state that a particular mistake was made . . . ; it must show why the mistake was of possible significance in the results . . . ." *Portland Cement Ass'n* v. *Ruckelshaus*, 486 F.2d 375, 394 (1973), *cert. denied*, 417 U.S. 921 (1974).

In any event, the alleged procedural defects regarding the staff study would not have been sufficient to warrant the court of appeals' rejection of the *Policy Statement*. As Judge Tamm noted, if that procedural defect is "sufficient to alter the normal standard of review of administrative decisions, then a remand to the Commission is proper." 610 F.2d at 864, FCC App. 54a.

[88] 610 F.2d at 849, FCC App. 21a.

[89] *Id.* at 852, FCC App. 27a.

[90] *Id.* at 849, FCC App. 21a.

an "administrative nightmare" and for finding, supposedly without adequate evidence, that such regulation would deter licensees from adopting unique formats.[91] The court similarly criticized the Commission for failing to define individual program formats so as to minimize the difficulties of distinguishing between different formats.[92]

As we discuss in detail below (pp. 62-70), the court of appeals had no basis for rejecting the Commission's findings as to the effects of format regulation, based on an extensive record and the agency's expertise in the field of broadcasting. But even if the Commission had overstated the difficulties of implementing the court's requirements or failed "to take affirmative steps to minimize" those difficulties, these are hardly legal grounds for mandating a regulatory regime. Surely the Commission is not required to engage in regulation simply because such regulation might be easy to implement. The court of appeals' reasoning suggests the substantial extent to which it misperceived its role as a reviewing court.

Second, and more important, the decision below rests upon the court's own unsupported construction of the public interest standard and on its view that the Commission must regulate program formats to achieve program diversity; that each significant segment of the listening audience is entitled to receive the particular program format that it prefers; and that the Commission cannot properly leave these programming judgments to individual licensee choice and to the marketplace.

[91] *Id.* at 849, 851, FCC App. 21a, 25a.

[92] *Id.* at 853, FCC App. 29a.

Regulation is required because, in the court's view, the marketplace does not always function properly.[93]

Despite the court's emphasis on the supposed differences between its assessment and the Commission's assessment of the marketplace, the court, like the Commission, observed that "market forces do generally provide diversification of formats."[94] Similarly, the Commission, like the court, found that "[t]he market allocation method is not . . . perfect."[95] Thus, the Commission's reliance on licensee judgment was not in fact based on any notion that the market could perfectly reflect listener format preferences. Just as editorial freedom does not achieve perfection in journalism,[96] so here, the marketplace does not always achieve what might be viewed by a government agency as the most desirable result. Indeed, as the Commission suggested in its decision, a "perfect result" is unobtainable.[97] Having recognized that all those wishing to speak cannot be accommodated in the broadcast

[93] The court found, without the slightest support in the record, that "broadcasters . . . tend to serve young adults with large discretionary incomes in preference to demographically less desirable groups." *Id.* at 851, FCC App. 24a. The only authority cited was the earlier court of appeals decision in *WEFM*. 506 F.2d at 268. In fact, the only evidence presented to the Commission was to the contrary. *See* Appendix 4 to the Comments of National Association of Broadcasters.

[94] 610 F.2d at 851, FCC App. 24a.

[95] *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 128a.

[96] *CBS* v. *DNC*, 412 U.S. at 124-25.

[97] *Policy Statement*, 60 F.C.C.2d at 863, FCC App. 128a.

medium,[98] it similarly follows that the particular program preferences of all listeners cannot be satisfied.

What the Commission concluded was that the market possessed a degree of flexibility "which no system of regulatory supervision could possibly approximate."[99] It doubted that greater diversification would result from the requirements imposed by the court of appeals, and concluded that whatever speculative benefits might be achieved were outweighed by the importance of preserving freedom of licensee choice and minimizing Commission involvement in programming, both of which are important goals of the Communications Act. The Commission's judgment was entirely consistent with this Court's observation in *FCC* v. *NCCB* that there is nothing "in the Communications Act, the First Amendment, or the Commission's past or present practices that would require the Commission to 'presume' that its diversification policy should be given controlling weight in all circumstances."[100] This judgment was also fully consistent

[98] *CBS* v. *DNC*, 412 U.S. at 101; *Red Lion*, 395 U.S. at 376.

[99] 60 F.C.C.2d at 864, FCC App. 131a.

[100] 436 U.S. at 810. In *National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938, 962-63 (D.C. Cir. 1977), *aff'd in part and rev'd in part, FCC* v. *NCCB*, the court of appeals also relied on Section 303(g) of the Act, which obligates the Commission "to encourage the larger and more effective use of radio in the public interest," 47 U.S.C. § 303(g), for its holding that the policy of diversification should be controlling. 436 U.S. at 809. In the *WEFM* format decision, the court similarly relied upon Section 303(g) for its view of the importance of diversity. 506 F.2d at 267. This interpretation of Section 303(g) was repudiated by this Court in *FCC* v. *NCCB*, 436 U.S. at 809-10. The decision below cited only the public interest standard, suggesting that the court is no longer specifically relying on the "larger and more effective use" language of Section 303(g) to support its program format doctrine.

with the legislative history of the Communications Act which emphasizes the importance of broadcaster freedom of program selection.

C. The Communications Act Reflects a Policy of Leaving Broad Latitude to Licensees in the Selection of Programming

1. *This Court has recognized that the general policy of the Act is to leave the choice of programming to broadcasters*

The Commission's statutory authority to engage in program regulation is narrowly limited. For example, while the Commission is authorized by statute to implement the fairness doctrine, sustained by this Court in *Red Lion*, and the prohibitions against obscenity and indecency in Section 1464 of the Criminal Code, 18 U.S.C. § 1464, as narrowly construed by this Court in *Pacifica*, the agency has neither the obligation nor the authority to engage in general program regulation. The general policy of the Act is to leave programming judgments to individual licensees to the maximum possible extent.

That policy was recognized by this Court soon after the enactment of the 1934 Act in *Sanders Brothers*. There the issue was whether the Commission could authorize a competing station in an area already served. Just as the Commission here held that competing radio formats are beneficial, there the Commission held that the existence of one service in an area should not foreclose further competitive services. In upholding the Commission's decision, this Court observed that in enacting the 1927 and 1934 Acts:

> "Congress intended to leave competition in the business of broadcasting where it found it, to permit a licensee . . . to survive or succumb according to his

ability to make his programs attractive to the public." [101]

While the court of appeals in an earlier format decision rejected the teachings of *Sanders Brothers* on the ground that that case had been undermined by "more recently" decided authority,[102] this Court has repeatedly confirmed the importance of preserving freedom for broadcaster judgment in the area of program content.

As this Court noted in *CBS* v. *DNC*, after reviewing the legislative history of the 1927 Radio Act, "Congress appears to have concluded . . . that of [the] two choices—private or official censorship—Government censorship would be the most pervasive, the most self-serving, the most difficult to restrain and hence the one most to be avoided." [103] The Court found that this choice was expressed in various provisions of the Communications Act, including Section 3(h) [104] and Section 326 [105] which

[101] 309 U.S. at 475. Applying this governing concept to the facts of this case, the Commission concluded that "meaningful competition between stations must necessarily focus on program formats. There is virtually no other area in which competition is possible." *Reconsideration Order*, 66 F.C.C.2d at 79, FCC App. 179a.

[102] *WEFM*, 506 F.2d at 267. The court suggested that *National Broadcasting Co.* v. *United States*, 319 U.S. 190 (1943), which upheld rules designed to promote the free choice of programming by licensees, impliedly limited the holding of *Sanders Brothers*. The *NBC* decision hardly undercuts the preeminence of broadcaster freedom of program choice under the Communications Act.

[103] 412 U.S. at 105.

[104] 47 U.S.C. § 153(h). Section 3(h) provides that "a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

[105] 47 U.S.C. § 326.

this Court cited as evincing a "legislative desire to preserve values of private journalism." [106]

Last Term, *FCC* v. *Midwest Video Corp.*, 440 U.S. 689 (1979), confirmed the importance of licensee control over programming. The Commission's access rules for cable television were held invalid, in large part, because they barred operators "from determining or influencing the content of access programming." [107] In invalidating the regulation the Court found that similar requirements directed to broadcasters could not be sustained.[108] The Court contrasted access regulation with the fairness doctrine which "contemplates a wide range of licensee discretion" [109] and reaffirmed "the policy of the Act to preserve editorial control of programming in the licensee." [110]

2. *Congress specifically considered and rejected proposals which would have authorized the agency to regulate radio program formats*

Congress not only adopted general policies favoring freedom of licensee choice, it also focused specifically on the question of whether the Commission could choose among various types of programming selected by licensees, and establish priorities as to subject matter. It concluded that the Commission should have no such authority.

During Congressional consideration in the early 1920s of legislation to regulate broadcasting more effectively, attention was given to the standards that the government would apply in choosing among applicants for the

[106] 412 U.S. at 109.

[107] 440 U.S. at 702.

[108] *Id.* at 706-08.

[109] *Id.* at 705 n.14.

[110] *Id.* at 705.

limited number of radio frequencies. In this context, the issue of whether the proposed agency should be authorized to set subject matter "priorities" in granting radio licenses was a major focus of the legislative inquiry. At hearings before a House Committee, the Solicitor of the Department of Commerce (which administered a 1912 statute governing the radio industry [111]) was specifically asked whether the Department considered programming priorities in awarding licenses:

> "Is the fact they are going to broadcast sacred music —does that have any more effect on getting a license than the fact that you are going to broadcast jazz? Do you take that into consideration?"

The Solicitor replied that "there never has been any policy of preference to any particular class as against any other class [of stations]." [112]

Various Congressmen and other interested parties were not satisfied with the existing practice of the Commerce Department, and suggested that the new agency be given greater power. The question of authorizing the agency to set program priorities had arisen as early as the First National Radio Conference, organized in 1922 by then-Secretary of Commerce Herbert Hoover to study the growing problems of radio communications and to make recommendations for increasing federal regulatory powers.[113] At that conference, Congressman Wallace

[111] Radio Communications Act of 1912, ch. 287, 37 Stat. 302.

[112] *Hearings on H.R. 5589 Before the House Comm. on the Merchant Marine & Fisheries*, 69th Cong., 1st Sess. 37 (1926).

[113] The proceedings of the National Radio Conference were cited by this Court in *Red Lion* as an important part of the legislative history of the Radio Act of 1927. 395 U.S. at 375 n.4.

White, later the author and floor manager of the bill that became the basis for the Radio Act of 1927, took an active role.

During a discussion of a broadcaster's desire to broadcast sermons and symphony concerts unencumbered by advertising messages, in contrast with the programming available from commercial ventures, Congressman White inquired about the advisability of establishing priorities among types of radio programs. Posing hypothetical choices between "religious sermons" and "prize fight reports," between "crop reports" and "baseball reports," between "baseball" and "horseracing" coverage and between a "sermon" and "sacred concert," Congressman White observed that "I don't want the Secretary's job of defining a priority," and that it would be difficult to establish programming priorities without "go[ing] pretty close to censorship." [114]

Despite his substantial misgivings, Congressman White subsequently incorporated in a bill language designed to give the government the power to establish such priorities for particular classes of stations.[115] That bill would have authorized the licensing authority, in the public interest, to classify stations, to determine the nature of the service to be presented, and to:

> "prescribe . . . the priorities as to subject matter to be observed by each class of licensed stations and of each station within any class . . . ."

While this bill never passed the House,[116] the same issue re-emerged in connection with House consideration

[114] Minutes of Open Meeting of Dep't of Commerce Conference on Radio Telephony, Feb. 27-28, 1922, at 95-96. *See also id.* at 11, 123-24.

[115] H.R. 7357, 68th Cong., 1st Sess. § 1(B) (1924).

[116] *See* 66 CONG. REC. 2361 (1925); 68 CONG. REC. 2572 (1927).

of the bill that subsequently became the basis for the Radio Act of 1927.[117] In that bill, language of the earlier bill which would have authorized the government to establish program priorities was deleted. During hearings on this revised bill, Congressman Davis, a member of the House Committee, alluded to the existing inability of a "high-class music" station to broadcast without interference from a station "on the air with a lot of jazz music."[118] He inquired whether there "ought not to be some provision [in the new bill] to afford a better and more wholesome set of programs than sometimes exist."[119] In his view it was necessary to "put something in the act specifically to authorize and direct [the agency] to take those matters into consideration in determining who shall and who shall not receive licenses and renewals."[120]

At this point, it was objected that a provision for individual licensing on the basis advocated by Congressman Davis might well "be almost the entering wedge to censorship." Congressman White, the author of the legislation, confirmed that no such programming priorities were authorized by his bill. In fact, he noted that such authority had been intentionally deleted from his earlier bill "because of the fear which had been expressed by so many to me that that did confer something akin to censorship."[121]

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[117] H.R. 5589, 69th Cong., 1st Sess. (1926).

[118] *Hearings on H.R. 5589*, *supra* note 112, at 38.

[119] *Id.* at 39.

[120] *Id.*

[121] *Id.* At the same time the bill had retained language authorizing the licensing agency to establish classes of radio stations and to prescribe "the nature of the service to be rendered by each class of licensed stations and each station within any class"—provisions that ultimately became Sections 303(a) and 303(b) of the 1934 Act. 47 U.S.C. §§ 303(a), 303(b).

As noted above (note 100, *supra*), the court of appeals in *WEFM* had relied in part on Section 303(g) as requiring format regulation. The deletion from Section 303 of the provision granting authority to the agency to establish program priorities clearly demonstrates that Congress did not intend Section 303(g)—authorizing the agency to "encourage the larger and more effective use of radio in the public interest"—to require the Commission to impose such priorities.

The bill was subsequently passed by the House[122] without granting the agency any power to establish program priorities. Opposition to Commission censorship was at least as strong in the Senate, which added a new Section 29 (now Section 326) specifically barring not only "censorship" but any Commission action that would "interfere with the right of free speech by radio communications."[123] The Senate version was adopted in conference.[124]

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[122] 67 CONG. REC. 5647 (1926). As passed, the bill was amended and renumbered H.R. 9971. H.R. 9971, 69th Cong., 1st Sess. (1926). *See* H.R. CONF. REP. No. 1886, 69th Cong., 2d Sess. 16-17 (1927).

[123] *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926). *See also* H.R. CONF. REP. No. 1918, 73d Cong., 2d Sess. 49 (1934): "Section 326 prohibits censorship and is the same as section 29 of the Radio Act." *Accord*, S. REP. No. 781, 73d Cong., 2d Sess. 8 (1934).

[124] H.R. CONF. REP. No. 1886, *supra* note 122, at 19. *See also* 67 CONG. REC. 5480 (1926) (colloquy involving Representative White); *Hearings on S. 1 and S. 1754 Before the Senate Comm. on Interstate Commerce*, 69th Cong., 1st Sess. 121 (1926).

[Footnote continued on page 48]

The 1934 Act made no change in these provisions. Indeed, during hearings in 1934 Congressman (by then Senator) White confirmed the purpose of the 1927 Act, stating:

> "At one time, in an earlier draft [of the 1927 Act] which I had presented in the House, I did have a direction that the regulatory body should establish priorities as to character of service, but even that was so controversial that it was eliminated from the final draft, *and there was a very clear purpose to give no prior rights or preferential recognition to any group or to any service.*" [125]

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[124] [Continued]

While this Court's opinion in *Pacifica* may be read to suggest that Congress intended to do no more than merely prohibit prior restraints when it enacted the ban on censorship, 438 U.S. at 735, it is clear that Congress was concerned about broader issues of program content regulation, and that Section 326 was part of the Congressional response to these broader concerns. In any event, the court of appeals' requirements here plainly involve the Commission in prior restraint even as that term was construed by this Court in *Pacifica*.

[125] *Hearings on S. 2910 Before the Senate Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 191 (1934) (emphasis supplied).

Following the passage of the 1927 Act, there was some discussion at Congressional hearings of the Commission's regulatory authority over clear channel stations and whether the agency could prohibit commercial advertising on those stations; in that context Congressman White made a passing reference to possible Commission authority under the existing law to establish program priorities. *Hearings on H.R. 8825 Before the House Comm. on the Merchant Marine & Fisheries*, 70th Cong., 1st Sess. 144 (1928). However, as noted in the text, in connection with the passage of the Communications Act of 1934 Congressman (then Senator) White

In summary, therefore, the only legislative history of the Communications Act bearing on the Commission's authority to regulate program formats demonstrates that Congress declined to grant the agency the power to establish program priorities and expressly barred agency censorship, thus making clear its firm commitment to leaving programming decisions with licensees.[126] Whether

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reaffirmed that the 1927 Act had not been intended to "establish priorities as to the character of service."

Congress in 1934 also rejected a proposal to allocate 25% of all radio stations to educational, religious, agricultural and similar nonprofit associations, in part, because the task of equitably allocating such stations would be impossible. *See* 78 CONG. REC. 8843-46 (1934). This concern, of course, was identical to that of the Commission in this case. Therefore, Congress requested the Commission to report on whether such an allocation would be desirable, Communications Act of 1934, ch. 652, § 307(c), 48 Stat. 1064 (1934), and the Commission in 1935 reported that it believed that an allocation would be undesirable because sufficient variety and opportunities were present under the existing regulatory scheme. *Report of the Federal Communications Commission to Congress Pursuant to Section 307(c) of the Communications Act of 1934*. While the Commission later licensed a class of noncommercial educational radio stations, *see* 47 C.F.R. § 73.501 (1979), it has acknowledged the dangers of licensing such stations on the basis of their programming rather than on the basis of their mere status as non-profit educational institutions. *Notice of Inquiry: Amendment of the Commission's Rules Governing the Eligibility for Noncommercial Educational FM and TV Broadcast Station Licenses*, 43 Fed. Reg. 30,842, 30,843-44 (1978).

[126] Another provision of the Communications Act also forecloses Commission regulation of format changes in the assignment/transfer context. Section 310(d) states that in determining whether a proposed assignment or transfer of construction permit or station license is in the public interest, the application "shall be disposed of as if the proposed trans-

the distinction is between "high-class" and "jazz," as it was at the time of the 1927 Act, or between "classical" and "contemporary," as it was in *WEFM*, Congress did not authorize the Commission to assign priorities to one type of programming over another. While regulation in this area might, in one Congressman's words, "afford a . . . more wholesome set of programs," [127] there was nevertheless a consensus that it would also involve the regulatory agency in impermissible censorship and would not achieve the public benefits to be derived from licensee selection of program material.

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feree or assignee were making application under section 308 of the title for the permit or license in question." 47 U.S.C. § 310(d). The legislative history of that provision, added in 1952, demonstrates that Congress intended to prevent the Commission from giving comparative consideration to "the qualifications of or operation of the facilities by the transferor," with those of the proposed transferee (98 CONG. REC. 7394 (1952)) or to the relative merits of other potential transferees. *See* Brief for NAB in the court below at 8-16, discussing, *inter alia*, 98 CONG. REC. 7394, 7397, 9022, 9033 (1952); *Hearings on S. 1973 Before a Subcomm. of the Senate Comm. on Interstate and Foreign Commerce*, 81st Cong., 1st Sess. 35 (1949); *Hearings on S. 658 Before the House Comm. on Interstate and Foreign Commerce*, 82d Cong., 1st Sess. 73, 96-97 (1951); S. REP. No. 44, 82d Cong., 1st Sess. 12 (1951).

Obviously a comparison of the transferor with the transferee on the basis of their formats would be contrary to the legislative intent. In peremptorily dismissing the argument that Section 310(d) prohibits this comparison, the court below mischaracterized this argument and apparently ignored this important legislative history. *See* 610 F.2d at 852 n.37, FCC App. 26a-27a.

[127] *Hearings on H.R. 5589*, *supra* note 112, at 39.

D. The Commission's Consistent Construction of the Communications Act Provides Further Support for the View that the Act Was Never Intended To Allow Regulation of Program Formats

While the Commission to a limited extent reviews programming under the public interest standard as part of the licensing process—for example, inquiring into whether the broadcaster has provided programming responsive to the ascertained needs and interests of the community [128] —the Commission has uniformly held that the choice of specific programs is for the broadcaster. "For over 40 years," the Commission observed, "broadcast applicants have been free to select their own programming formats." [129]

The Commission was apparently not urged to engage in format regulation until the mid-1950s. When the issue did arise, the Commission made clear its view that such regulation was inappropriate. As it noted in 1956, "the Commission has never imposed a definite program format as a prerequisite to an authorization for operation of a television or radio broadcast station." [130] In response to

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[128] *See Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650 (1971).

[129] *Notice of Inquiry*, 57 F.C.C.2d at 585, FCC App. 72a.

[130] *Eastern Okla. Television Co.*, 14 P&F Radio Reg. 148, 149 (1956) (dictum). *See also Brush-Moore Newspapers, Inc.*, 20 F.C.C. 919, 967 (1956).

At about the same time, observing that abandonment of a "good music" format would not be a reason for disapproving a license transfer, the hearing examiner stated in *Bay Radio, Inc.*, 22 F.C.C. 1351, 1364 & n.16 (1957):

> "The Commission may not properly refuse to consent to the transfer of a station or the assignment of its license merely because the assignee or transferee proposes to change the programming of the station. It has no power

a contention in a comparative television hearing that an applicant "placed undue emphasis on 'hillbilly' music," the Commission ruled that "it is not within [our] purview to be the arbiter of good taste in such matters." [131] The Commission's belief that format selection is a matter best left to the editorial judgment of the license applicant, rather than to administrative regulation, was echoed in subsequent opinions.[132]

Prior to the present proceeding, perhaps the Commission's most extensive discussion of the problems associated with regulating programming came in its 1960 *En Banc Programming Report*.[133] In this seminal statement, the Commission recognized that censorship was inherent in program regulation and that "Congress placed the basic responsibility for all matter broadcast to the public . . . in the hands of the station licensee." [134] Accordingly,

> "the Commission in administering the Act and the courts in interpreting it have consistently maintained that responsibility for the selection and presentation of broadcast material ultimately devolves upon the individual station licensee, and that the fulfillment of the public interest requires the free exercise of his independent judgment." [135]

Similarly, while the Commission has required that license applicants survey the problems, needs and interests of their service areas and consider what responsive programming should be presented, the Commission stated that licensees are not obligated to present particular programs or particular types of programs that listeners may wish to hear.[136] Those judgments are left to broadcasters. As the Commission observed in its 1971 *Ascertainment Primer*:

> "Our view has been that the station's [entertainment] program format is a matter best left to the discretion of the licensee or applicant . . . ." [137]

It cannot be doubted that the Commission's construction of the Act is entitled to substantial deference. In *CBS* v. *DNC*, this Court, referring to the Federal Communications Commission, noted that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong.' " [138] According weight to a Commission determination is particularly appropriate where the Commission has attempted to accommodate First Amendment concerns [139] since the " 'public interest' standard necessarily invites reference to First Amendment principles." [140] As we discuss in the next section, First

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of censorship over the programming of broadcast stations [citing 47 U.S.C. § 326]. Neither can it direct broadcasters . . . to maintain any particular program policy in perpetuity."

[131] *Richmond Newspapers, Inc.*, 20 F.C.C. 185, 219 n.10 (1955).

[132] *See, e.g., AM-FM Program Duplication*, 2 F.C.C.2d 833, 840 (1966); *WGRY, Inc.*, 2 P&F Radio Reg.2d 718, 723 (1964); *ABW Broadcasters, Inc.*, 1 P&F Radio Reg.2d 65, 70 (1963).

[133] 44 F.C.C. 2303.

[134] 44 F.C.C. at 2311.

[135] *Id.* at 2308-09.

[136] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 F.C.C.2d 650, 679 (1971).

[137] *Id.*

[138] 412 U.S. at 121, *quoting Red Lion*, 359 U.S. at 381.

[139] *CBS* v. *DNC*, 412 U.S. at 102-03.

[140] *Id.* at 122.

Amendment principles support the Commission decision in this case.

II. FIRST AMENDMENT CONSIDERATIONS STRONGLY SUPPORT THE COMMISSION'S POLICY DECISION

The selection and implementation of program formats, involving a combination of artistic and editorial expression, is at the very core of the decisionmaking process in radio broadcasting. The choice and presentation of music and other entertainment is a form of artistic expression. Similarly, the choice and presentation of news and information by broadcasters is a form of journalistic expression.

Editorial judgments and creative skills are the stuff that program formats are made of—cutting across nearly all aspects of day-to-day station operation. Government regulation of program formats would directly contravene fundamental First Amendment principles designed to protect these activities.

A. The Regulatory Scheme Forced on the Commission by the Court of Appeals Seriously Impairs Basic First Amendment Rights

If the Commission had unilaterally embarked on the scheme of program format regulation mandated by the court of appeals, that scheme would have raised the gravest constitutional questions. As Mr. Chief Justice Burger stressed in *CBS* v. *DNC*, the radio industry is a system of "essentially private broadcast journalism held only broadly accountable to public interest standards." [141] The Commission's role with respect to broadcast program content is limited by both the First Amendment and the

[141] 412 U.S. at 120.

regulatory scheme established by the Communications Act.[142] While the Congress and the Commission have imposed certain restrictions on broadcasters that might not be permissible as to newspapers,[143] the agency is not free to engage in extensive and far-reaching regulation of program content in pursuing its regulatory responsibilities. "The Commission is given no supervisory control of the programs, of business management or of policy." [144] This restriction clearly encompasses the entertainment,[145] as well as the news and informational components of broadcast programming.

Although the Commission has been permitted to oversee certain limited programming aspects of broadcast station operation, it must afford substantial deference to licensee discretion and strictly adhere to the First Amendment principle that the government should not regulate so as to either advance one side of an issue or favor one public taste (whether political, cultural or otherwise) over another. While the general encouragement of diversity of choice is a legitimate public interest objective, the government is precluded from making the actual choices. As Mr. Justice Stevens noted in *Pacifica*, 438 U.S. at 745-46, "it is a central tenet of the First Amendment that the government must remain neutral in the

[142] 47 U.S.C. § 326. *See* pp. 41-50 *supra*; *United States* v. *Paramount Pictures, Inc.*, 334 U.S. 131, 166 (1948).

[143] *See Pacifica*; *FCC* v. *NCCB*; *Red Lion*.

[144] *Sanders Brothers*, 309 U.S. at 475. The Court in *CBS* v. *DNC* also emphasized that the regulatory scheme established by Congress reflected a "legislative desire to preserve values of private journalism." 412 U.S. at 109.

[145] *See, e.g., Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 501 (1952); *Winters* v. *New York*, 333 U.S. 507, 510 (1948) ("[w]hat is one man's amusement, teaches another's doctrine").

marketplace of ideas." Similarly, the First Amendment denies the "government [the] power to restrict expression because of its message, its ideas, its subject matter, or its content." [146] Program format regulation would not comply with this principle.

The regulatory regime established by the court of appeals would thrust the Commission into a programming role that it has never before assumed and that decisions of this Court have never before permitted. Not only would the Commission have to directly review and assess the artistic and journalistic judgments of individual licensees, it would also in certain cases be required to reject "virtually the entire broadcast schedule proposed by the private licensee," and to direct "a licensee to adopt a particular type of format." [147]

No court has ever required or permitted the Commission to determine the general substance of a broadcaster's overall programming and no decision has required the Commission to institute any overall scheme of program regulation which the agency opposed. For instance, the Commission's fairness doctrine—upheld in *Red Lion*—was deemed constitutionally acceptable only because it "contemplates a wide range of licensee discretion." [148] The fairness doctrine is intended to ensure that broadcasters "give adequate coverage to public issues" and that broadcasters who elect to present one side of a controversial issue of public importance will balance that coverage with a broadcast of the opposite view.[149] It does not dictate or control a broadcaster's initial choice of programming or

[146] *Police Dep't of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

[147] *Reconsideration Order*, 66 F.C.C.2d at 83, FCC App. 188a.

[148] *See Midwest Video*, 440 U.S. at 705 n.14.

[149] *Red Lion*, 395 U.S. at 378.

restrain the broadcast of speech. Indeed, the Court in *Red Lion* cautioned that government "refusal to permit [a] broadcaster to carry a particular program" would raise "serious First Amendment issues." [150]

Here, in contrast, the decision below mandated sweeping program content regulation, directing the Commission, under certain circumstances, to dictate a licensee's complete program schedule by forcing it to utilize a certain format—"classical" or "middle-of-the-road" or "country and western" or "all-news" or "all-talk"—where the broadcaster has affirmatively exercised a contrary editorial and artistic judgment. Whether the Commission is considering regulation of broadcast journalism or entertainment formats, the agency would be engaged in overriding basic judgments made by licensees which are protected by the First Amendment. Thus program format regulation would inevitably result in direct prior restraints of free speech—Commission orders requiring broadcasters to refrain from broadcasting proposed programming. The court of appeals gave no indication that it considered the fact that a prior restraint of speech was involved here which in and of itself raises special constitutional concerns.[151]

Moreover, it is significant that the objective of diversity can be achieved by less drastic means than regulation of radio program formats or other types of direct program regulation. For example, the Commission has, over a period of many years, promulgated regulations restricting the multiple ownership of broadcast stations.[152] So,

[150] *Id.* at 396. *See also National Broadcasting Co.* v. *United States*, 319 U.S. 190, 226 (1943).

[151] *See Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 558-62 (1975).

[152] Commission rules prohibit the cross-ownership of more than one station in the same broadcast service (AM, FM, or

too, its AM-FM non-duplication rule [153] ensures that AM and FM stations owned by the same entity will not unduly duplicate programming and that the listening audience of a particular community therefore will have more program choices. In addition, the Commission currently has under consideration steps that would significantly increase the number of radio broadcast stations.[154] The Commission has also licensed numerous public broadcasting stations which further increase diversity of format choice in many communities.[155]

While promoting the objective of diversity, none of these approaches raises the same constitutional concerns as format regulation. None would ban or directly interfere with a licensee's chosen program material. Nor would the alternatives create a danger that the agency would favor one type of programming over another and therefore one side of an issue or one cultural taste over

television) in the same community; the cross-ownership of a VHF television station and any radio station serving the same community; and the common ownership of more than a total of seven AM, seven FM, and seven television stations (of which only five may be VHF). 47 C.F.R. §§ 73.35, 73.240, 73.636. For a review of the development of these rules, see *FCC* v. *NCCB*, 436 U.S. at 780-81.

[153] 47 C.F.R. § 73.242.

[154] *Inquiry Concerning 9 kHz Channel Spacings for AM Broadcasting*, 44 Fed. Reg. 39,550 (1979); *World Administrative Radio Conference*, 70 F.C.C.2d 1193, 1211-14 (1979).

[155] As of March 31, 1980, there were 1,035 non-commercial stations on the air. FCC Public Notice, Broadcast Station Totals for March 1980 (April 9, 1980). These included 228 stations subscribing to National Public Radio, an organization providing its members with a broad selection of programming, including jazz music, documentaries, and a daily news magazine. *Broadcasting*, March 17, 1980 at 54; THE RADIO FORMAT CONUNDRUM, *supra* note 7, at 261.

another. Since these "less drastic means" of achieving program diversity do exist, the First Amendment requires that the Commission forego the more restrictive regulatory alternative of direct regulation of formats. *See Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).[156]

In any event, this Court does not have to decide whether Commission program format regulation would be unconstitutional since the Commission decided not to regulate program formats, premising that decision in large part upon its deep First Amendment concerns.

B. The Commission's Policy Decision Affirmatively Sought To Protect These Fundamental First Amendment Values

One of the Commission's primary reasons for initiating the format inquiry was its concern that the First Amendment prohibits the "close scrutiny of broadcast program content judgments" [157] required by the court of appeals. In light of the Commission's longstanding practice,

[156] As we have noted, considerations of program diversity do not justify detailed program regulation by the Commission in any event. It is clear that the less drastic "alternatives" need not be as efficient as the "means" rejected. In *Schneider* v. *State*, 308 U.S. 147 (1939), a case involving, *inter alia*, a city ordinance requiring those who would distribute pamphlets door-to-door to first secure police approval, the Court acknowledged that the alternatives suggested there may have been "less efficient and convenient" than the challenged ordinance, but concluded that "considerations of this sort do not empower a municipality to abridge freedom of speech." *Id.* at 164.

[157] *Notice of Inquiry*, 57 F.C.C.2d at 592, FCC App. 65a. Accordingly, the Commission sought comment on whether "any system of Commission intervention in, or selection of, licensee entertainment formats [would] violate the First Amendment." *Id.* at 585, FCC App. 72a.

premised on assiduously avoiding entanglements in program format decisions, and given the fact that the court of appeals had required Commission intervention in this area "with nary a syllable spoken to the First Amendment implications of its decision," [158] we believe the Commission appropriately undertook its own, more comprehensive examination of the First Amendment ramifications of format regulation.

In its *Policy Statement*, the Commission concluded that "[a]ny such regulatory scheme would be . . . unconstitutional as impermissibly chilling innovation and experimentation in radio programming." 60 F.C.C.2d at 865-66, FCC App. 134a. In its view, format regulation would require frequent intervention into the programming decisions of broadcasters, producing "an unnecessary and menacing entanglement in matters that Congress meant to leave to private discretion." [159] The Commission's subsequent order denying reconsideration provided further elaboration of its concerns and concluded that "*detailed governmental scrutiny into such matters would raise serious First Amendment problems.*" 66 F.C.C.2d at 82, FCC App. 186a (emphasis supplied).

C. The Court of Appeals Failed To Afford Proper Weight to the Commission's First Amendment Concerns

Despite the Commission's deep First Amendment concerns, confirmed by long administrative experience and tested in a public inquiry, the majority opinion of the court of appeals dismissed the Commission's constitutional concerns.[160] The court's view seems to have been,

[158] *WEFM*, 506 F.2d at 269 (Bazelon, J., concurring).

[159] *Policy Statement*, 60 F.C.C.2d at 865, FCC App. 133a.

[160] *See* 610 F.2d at 855, FCC App. 33a. Judge Bazelon voiced concern about the "perilous government oversight of the content of expression," urging that, because of the First Amendment difficulties of previous program-related regulation, the court should not "so easily reject the FCC's decision to turn away from this troubling experience and to cast its lot with the marketplace." *Id.* at 859, FCC App. 43a. Judges Tamm and MacKinnon agreed with Judge Bazelon concerning the "substantial" nature of the First Amendment concerns. *Id.* at 861 n.8, FCC App. 48a. The court of appeals failed even to refer to First Amendment issues in the earlier format cases. In *WEFM*, the court expressly declined to discuss First Amendment concerns, reasoning that it "need not . . . wade into such deep waters." 506 F.2d at 267.

first, that the Commission could not rely on such conclusions because it had not provided sufficient factual evidence that the court of appeals' policy had deterred actual licensee format choices and, second, that the Commission had not given sufficient attention to developing standards under which it could regulate formats without the perceived intrusive effects.

In disregarding the Commission's findings and conclusions concerning the constitutional issues, the court below failed to apply the standard of review established by this Court in *CBS* v. *DNC*. There, the Court emphasized that when the Commission decides not to regulate because of First Amendment considerations, reviewing courts must proceed with utmost caution and with due deference for Commission experience:

> "Balancing the various First Amendment interests involved in the broadcast media and determining what best serves the public's right to be informed is a task of great delicacy and difficulty. The process must necessarily be undertaken within the framework of the regulatory scheme that has evolved over the course of the past half century . . . .
>
> *Thus, in evaluating . . . First Amendment claims . . ., we must afford great weight to the decisions of Congress and the experience of the Commission.*" [161]

[161] 412 U.S. at 102 (emphasis supplied).

The Commission's findings here, based on that experience, lend substantial support to its decision.

1. *The Commission correctly found that format regulation would have an undue chilling effect on licensees' program judgments*

A Commission finding of central significance was that format regulation would be "unconstitutional as impermissibly chilling innovation and experimentation in radio programming." [162] The Commission reasoned—based on comments from the industry, programming experts and its own experience—that "the risks of undertaking innovative or novel programming" might escalate to an unacceptably high level for many licensees "[u]nder the threat of a hearing that could cost tens or hundreds of thousands of dollars." [163] The cost, delay and uncertainty caused by such hearings would be further exaggerated by prehearing procedures that are often more time-consuming than the hearing itself. Under these circumstances, and in ligh' of the ultimate risk that the government might force retention of a "unique" format, many licensees would be reluctant to pursue new and innovative programming concepts.[164]

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[162] *Policy Statement*, 60 F.C.C.2d at 865-66, FCC App. 134a.

[163] *Id.* at 865, FCC App. 132a. The Commission explained that several parties had commented on this effect and that it "regard[ed]" this finding "of great importance." "The existence of the obligation to continue service, we find, inevitably deprives the public of the best efforts of the broadcast industry and *results in an inhibition of constitutionally protected forms of communication with no off-setting justifications . . . .*" *Id.*, FCC App. 132a-33a (emphasis supplied).

[164] As Professor Owen observed, "[it] is doubtful whether such relatively recent innovations as the 'all news' format could have arisen" under the court of appeals requirement.

[Footnote continued on page 63]

The court of appeals dismissed these findings by noting that the Commission had "provided little or no evidence that *WEFM* has in fact deterred licensees' format choices." [165] The court of appeals also concluded that "the Commission's fears appear somewhat less than realistic" because a "mere handful" of format cases had reached the court of appeals and that, in each of the three where the court held that a hearing was required, the controversy was ultimately settled.[166] The very fact that broadcasters feel compelled to settle cases in order to avoid the burden of a hearing suggests that the Commission's conclusions as to the chilling effect of such regulation are well founded.

Moreover, because of the uncertainties as to the scope of required regulation in the assignment context and because the decision below was the first to extend format requirements to the renewal context, the full impact of that regulation is still not apparent. Under such circumstances, the Commission cannot be expected to produce

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[164] [Continued]

Jt. App. at 33. With many stations adhering to more prevalent formats, stations with innovative or unique formats must bear a disproportionate regulatory burden—contrary to established public interest objectives. *See Notice of Inquiry*, 57 F.C.C.2d at 598-99, FCC App. 103a-05a (Statement of Commissioner Robinson).

[165] 610 F.2d at 851, FCC App. 25a.

[166] 610 F.2d at 848, FCC App. 18a-19a. The evidentiary hearings that were, in fact, conducted on remand in *WEFM* partially illustrate the practical difficulties. Even the limited issues in that case required 18 hearing days resulting in a transcript of 3,120 pages. Literally hundreds of hours were expended in preparing, prosecuting, and adjudicating the case. *Policy Statement*, 60 F.C.C.2d at 864-65, FCC App. 131a-32a.

definitive evidence to prove what is essentially a predictive judgment based on its experience. As this Court emphasized in *FCC* v. *NCCB*, "complete factual support in the record for the Commission's judgment or prediction is not possible or required." 436 U.S. at 814.

But even if the policy had been fully defined and implemented over the course of many years, it would be extremely difficult to marshall concrete evidence that regulation contrary to the First Amendment has chilled freedom of expression. "It is characteristic of the freedoms of expression in general that they are vulnerable to gravely damaging yet barely visible encroachments." [167]

2. *The Commission correctly found that program format regulation would necessarily require application of subjective and elusive standards*

The Commission was also concerned that format regulation would necessarily have to be undertaken without adequate standards. Under decisions of this Court, administrative standards must give adequate guidance, especially where First Amendment interests are involved.[168] Those subject to regulation must have adequate notice of the nature and extent of the requirements in order to avoid chilling protected expression. In addition, the absence of clear and precise standards greatly magnifies the potential for administrative censorship, based simply on an agency's notions of what the public should hear.[169]

[167] *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58, 66 (1963). *See generally Buckley* v. *Valeo*, 424 U.S. 1, 41 n.48 (1976); *Dombrowski* v. *Pfister*, 380 U.S. 479, 486-87 (1965); *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

[168] *See Interstate Circuit, Inc.* v. *Dallas*, 390 U.S. 676, 684 (1968); *Cox* v. *Louisiana*, 379 U.S. 536, 557-58 (1965); *Joseph Burstyn, Inc.* v. *Wilson*, 343 U.S. 495, 504-05 (1952).

[169] *See Erznoznik* v. *Jacksonville*, 422 U.S. 205, 217-18 (1975); *Ashton* v. *Kentucky*, 384 U.S. 195, 200-01 (1966).

Here, based on comments received and its own analysis, the Commission concluded that

> "it is extremely difficult to ascertain on an objective or principled basis what line distinguishes a given format from its neighbors, and at what point a change in programming may amount to a change of format . . . . Any second-guessing of licensee judgment would necessarily be highly subjective, and we are convinced that detailed governmental scrutiny into such matters would raise serious First Amendment problems." [170]

There was ample evidence before the Commission demonstrating the futility of attempting to categorize radio formats in any meaningful fashion.[171] Indeed, the Commission observed that the lines between formats were becoming "increasingly obscure." [172] Commissioner Robinson aptly summarized the problem:

> "What makes one format unique makes all formats unique. If subjectivity is to be an important determinant of what makes a format 'unique' (or, in other terms, what makes it a net contributor to diversity), how are we to avoid the fact that even with respect to formats which objectively seem identical, people—radio listeners—can and do make distinctions . . . . It follows, therefore, that by the subjective standards that the Court seems to embrace, any format is unique; from which it follows, all must

[170] *Reconsideration Order*, 66 F.C.C.2d at 82, FCC App. 186a.

[171] *See* Appendix B to the *Policy Statement*, 60 F.C.C.2d at 872-81, FCC App. 156a-70a; Henabery Report.

[172] *Reconsideration Order*, 66 F.C.C.2d at 82, FCC App. 185a.

be preserved. At that thought the mind swims and the heart sinks." [173]

Commissioner Robinson's concern appears fully justified against the backdrop of format rulings by the court of appeals. Thus, in *Progressive Rock*, the court cautioned that one station could occasionally duplicate another's selections and yet remain unique.[174] In *WEFM*, the court required the Commission to explore whether or not a "fine arts" station adequately served the "classical" music lovers of Chicago,[175] suggesting that a classical station playing twentieth century music would differ from one offering more nineteenth century music.[176]

Moreover, the suggestions concerning format classification advanced by the decision below hardly alleviate the problem. The court, for example, suggested that the Commission "could arrive by rulemaking at a format taxonomy which, even if imprecise at the margins, would be sustainable so long as not irrational." [177] But those imprecise "margins" are precisely the problem, and the Commission found that these definitional problems were

[173] *Notice of Inquiry*, 57 F.C.C.2d at 594-95, FCC App. 93a-94a. *See Reconsideration Order*, 66 F.C.C.2d at 84-85, FCC App. 191a-92a.

[174] 478 F.2d at 932.

[175] 506 F.2d at 264-65.

[176] *Id.* at 264 n.28. *See also Sentinel Heights FM Broadcasters, Inc.*, 29 F.C.C.2d 83 (1971), *rev'd sub nom. Citizens Committee to Preserve the Present Programming of WONO (FM)* v. *FCC*, No. 71-1336 (D.C. Cir. May 13, 1971), in which the petitioners charged that the assignee's classical selections would be "unadventurous" and "incongruous" ones compared to those of the assignor. The court of appeals summarily remanded for an evidentiary hearing on the basis of *Atlanta*.

[177] 610 F.2d at 853, FCC App. 29a (footnote omitted).

so pervasive as to render any attempt to develop a "format taxonomy" futile.[178]

The court of appeals also suggested that the Commission might not have to consider uniqueness at all, but might substitute a public grumbling test—one that would apparently take into account "certain unique features" not otherwise duplicated in the applicable service area.[179] The willingness of the lower court to abandon "uniqueness" is irreconcilable with its prior emphasis on the importance of that factor,[180] and undermines its own assertion that the doctrine presents a carefully drawn and easily understood requirement. Indeed, the scope of the format doctrine would be further expanded if, as the court also suggests, it applied not just to unique "formats," but to formats that had "certain unique features" which a significant number of listeners wanted to retain. Such a broad formulation of the format doctrine would bring virtually all programming changes of any significance within reach of Commission regulation.

Moreover, increased reliance on "public grumbling" in lieu of "uniqueness" would not provide the agency with

[178] For example, the issues in *WEFM* required testimony from a musicologist concerning the classical programming of stations in the Chicago area. The expert evaluated station offerings in terms of numerous divisions and subdivisions of music types, ranging from opera to musique concrete, and contrasted the stations' emphases during different parts of the day, all in an effort to gauge whether the stations could be found to have the same format. *See* Joint Proposed Findings of Fact and Conclusions of Law of GCC Communications of Chicago, Inc. and Zenith Radio Corporation, Proposed Findings of Fact 19 (pp. 18-19), 21 (p. 20), and 27 (pp. 23-24), filed April 6, 1976, in FCC Docket No. 20581.

[179] 610 F.2d at 853 n.47, FCC App. 30a.

[180] *See WEFM*, 506 F.2d at 262-65; *Progressive Rock*, 478 F.2d at 929 n.6; *Atlanta*, 436 F.2d at 271-72.

any less subjective a standard. The Commission would have to make many subjective judgments in assessing the size and significance of the group of public grumblers. Should the Commission set a threshold percentage? Is such a percentage feasible given population variations around the country and variations in the number of frequencies assigned to communities of license? Is it enough, for example, if only 16 percent of a community's residents prefer the station's existing format to the proposed format, as in *Atlanta*? [181] Should the Com-

[181] 436 F.2d at 267. *Atlanta* itself illustrates the inherent difficulties involved in regulating formats on the basis of perceived listener preferences. The court proceeded in that case on the assumption that 16% of Atlanta listeners preferred classical music as their first choice. *Id.* at 269 ("[w]e do not doubt that at our present level of civilization, a 16% ratio between devotees of classical music and the rest of the population is about right . . . ."). In reality, the survey conducted by the transferee showed only that 16% of the individuals questioned said that they preferred a classical format to the proposed blend of popular tunes. *Id.* at 267. The survey did not ask which format people most preferred or which station they in fact listened to. Many of those surveyed who preferred classical music to a popular blend may well have preferred another format to classical. Indeed, current industry figures show that only 1.1% of the Atlanta audience regularly listens to WGKA, Atlanta's established classical music station (October/November 1979). *Radio & Records Ratings Report*, 1979, Vol. 2 at 22. For classical stations WGMS (AM) and WGMS-FM in Washington, D.C., the aggregate figure is 2.8%. *Id.* at 147. In a market of twenty stations, it is highly improbable that a format with a 16% share would be abandoned. In fact, it is likely that a station with a 16% share in such a market would be more popular than all others. For example, in Atlanta, no station using any format achieved an audience share as high as 16% in the 1979 ratings. *Id.* at 22.

mission take into account the intensity of each listener's preference? [182] If so, how should that intensity be measured? [183]

Finally, in attempting to weigh the public interest benefits of an existing format against those of a proposed "unique" format, as effectively required by the format doctrine,[184] the Commission would have to inquire into the proposed format's degree of public support as well as its uniqueness. In the case of a proposed format, these inquiries would be even more speculative. A uniqueness determination would by necessity be based on written proposals rather than past programming, and public support could only be gauged by guesswork. The required comparison of the proposed and existing program formats would force the Commission to favor one format over another on the basis of content. In *Pacifica*, Mr. Justice Powell voiced his concern with such an approach:

[182] As the Commission noted, "[t]here is no way to determine the relative values of two different types of programming in the abstract. This is a practical, empirical question, whose answer turns on the *intensity* of demand for each format." *Policy Statement*, 60 F.C.C.2d at 864, FCC App. 130a (emphasis in original).

[183] Judge Tamm observed that the majority's theory below

> "assumes that the Commission will be able to balance number of listeners against intensity of format preference. Consider the top 40/classical format hypothetical. If twenty percent of the listening audience would mildly prefer a second top 40 format and five percent would vigorously prefer retention of the classical format, does the size of one audience outweigh the intensity of preference of the other? The majority opinion offers no clue."

610 F.2d at 863-64, FCC App. 53a.

[184] *See WEFM*, 506 F.2d at 260.

> "I do not subscribe to the theory that the Justices of the Court are free generally to decide on the basis of its content which speech protected by the First Amendment is most 'valuable' and hence deserving of the most protection, and which is less 'valuable' and hence deserving of less protection." [185]

There is, in effect, no way for the Commission to attempt to guarantee program diversity, as the court of appeals would require, without making a variety of unguided judgments on the basis of public taste.[186] Under such circumstances, the course chosen by the Commission in its *Policy Statement* is clearly the correct one. As this Court has recognized, "[d]iversity and its effects are . . . elusive concepts, not easily defined let alone measured without making qualitative judgments objectionable on both policy and First Amendment grounds." *FCC* v. *NCCB*, 436 U.S. at 796-97, *quoting National Citizens Committee for Broadcasting* v. *FCC*, 555 F.2d 938, 961 (D.C. Cir. 1977). Thus, the Commission reasonably determined that there are no meaningful and appropriate standards to avoid these problems.

• • •

In *CBS* v. *DNC*, this Court reviewed the role of broadcast licensees under the Act and the First Amendment, and affirmed the fundamental principle that licensees, not the Commission, are charged with the task of selecting broadcast programs:

> for better or worse, editing is what editors are for: and *editing is selection and choice of material*. That editors—newspaper or broadcast—can and do abuse this power is beyond doubt, but that is no reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values.[187]

The Court in *CBS* v. *DNC* was especially sensitive to the fact that Commission oversight and resolution of conflicting claims would involve the Commission in programming on a routine basis, threatening enlarged Commission control "over the content of broadcast discussion of public issues." [188] While such a requirement might have been thought to increase the overall diversity in broadcast programming, the Court concluded that "[t]o sacrifice First Amendment protections for a speculative gain is not warranted." [189]

In this case, as in *CBS* v. *DNC*,[190] the court of appeals has overridden the informed judgment of the Commission in a matter that directly involves the day-to-day editorial responsibilities of broadcast licensees. Here, unlike *CBS* v. *DNC*, which dealt only with spot advertising time, virtually the entire broadcast day is at stake.[191] Government control would extend to virtually

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[185] 438 U.S. at 761.

[186] The Commission has long adhered to the position that it is not the "national arbiter of taste." *See, e.g., Palmetto Broadcasting Co.*, 33 F.C.C. 250, 257 (1962), *reconsideration denied*, 34 F.C.C. 101 (1963), *aff'd sub nom. Robinson* v. *FCC*, 334 F.2d 534 (D.C. Cir. 1964).

[187] *CBS* v. *DNC*, 412 U.S. at 124-25 (emphasis supplied).

[188] *Id.* at 126.

[189] *Id.* at 127.

[190] *CBS* v. *DNC* is not even mentioned in any of the court of appeals' format decisions since 1973.

[191] While disagreeing with the majority's First Amendment conclusions about the editorial advertising at issue in *CBS* v. *DNC*, Mr. Justice Brennan agreed that Commission involvement in matters affecting basic programming decisions would raise significant First Amendment questions: "'[i]n normal programming time, closely controlled and edited by broadcasters, the constellation of constitutional interests would be substantially different.'" 412 U.S. at 199 n.45, *quoting* 450 F.2d at 654.

all artistic and editorial decisions of broadcasters—engulfing the entire program schedule and impermissibly establishing a "comprehensive, discriminating, and continuing state surveillance." [192]

CONCLUSION

For the reasons stated above, the decision of the court of appeals should be reversed.

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[192] *Policy Statement*, 60 F.C.C.2d at 865, FCC App. 134a, *quoting Lemon* v. *Kurtzman*, 401 U.S. 602, 619-20 (1971).

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APPENDIX

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The First Amendment to the Constitution of the United States provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Section 3(h) of the Communications Act of 1934, as amended, 47 U.S.C. § 153(h), provides:

> " 'Common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this chapter; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier."

Section 303(g) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(g), provides:

> "Except as otherwise provided in this chapter, the Commission from time to time, as public convenience, interest, or necessity requires, shall—
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."

Section 307(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 307(d), provides:

"No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer period than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses, and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby. In order to expedite action on applications for renewal of broadcasting station licenses and in order to avoid needless expense to applicants for such renewals, the Commission shall not require any such applicant to file any information which previously has been furnished to the Commission or which is not directly material to the considerations that affect the granting or denial of such application, but the Commission may require any new or additional facts it deems necessary to make its findings. Pending any hearing and final decision on such an application and the disposition of any petition for rehearing pursuant to section 405 of this title, the Commission shall continue such license in effect. Consistently with the foregoing provisions of this subsection, the Commission may by rule prescribe the period or periods for which licenses shall be granted and renewed for particular classes of stations, but the Commission may not adopt or follow any rule which would preclude it, in any case involving a station of a particular class, from granting or renewing a license for a shorter period than that prescribed for stations of such class if, in its judgment, public interest, convenience, or necessity would be served by such action."

Section 309(a) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(a), provides:

> "Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which section 308 of this title applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application."

Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. § 309(e), provides:

> "If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing, the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full

hearing in which the applicant and all other parties in interest shall be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission."

Section 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(d), provides:

> "No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby. Any such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 of this title for the permit or license in question; but in acting thereon the Commission may not consider whether the public interest, convenience, and necessity might be served by the transfer, assignment, or disposal of the permit or license to a person other than the proposed transferee or assignee."

Section 326 of the Communications Act of 1934, as amended, 47 U.S.C. § 326, provides:

> "Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication."